IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

JULIUS K. GRAVES,
Appellant,
vs.
CHESTER C. CORBIN,
Appellee.
No. 188.

THE FIRST NATIONAL BANK OF CHICAGO,
Appellant,
vs.
CHESTER C. CORBIN,
Appellee.
No. 980.

Appeals from the Circuit Court of the United States for the Northern District of Illinois, consolidated for purposes of hearing, by order of the Supreme Court.

BRIEF ON BEHALF OF JULIUS K. GRAVES, ONE OF THE APPELLANTS.

In the brief filed by us in these causes on behalf of the First National Bank of Chicago, we have given substantially the situation of the two appeals in this court, with an abstract of the pleadings and proceedings, and as brief a statement of the facts as seemed advisable, in view of the great length of the record and the magnitude of the interests involved. The record in the Graves case has

been printed in full, and a portion of the bank record; and, as a discussion of the propositions of law and fact in behalf of the bank involve something more than is required on behalf of Graves, we have prepared our brief and argument upon its appeal with the expectation that, on the hearing, so much thereof as is applicable will be considered by this court, with like force and effect as though the same had been reprinted and made a part of and included in the separate brief for Graves.

With this brief explanation we present, upon behalf of the appellant, Graves, the following:

STATEMENT OF ERRORS.

1. The Circuit Court erred in its finding, that the limited partnership of Boies, Fay & Conkey was insolvent August 20, 1882, and so continued to the termination of its business, January 22, 1883, to the knowledge of each of the members thereof.

2. The Circuit Court erred in its finding, that the acts and proceedings of said firm and the members thereof, whereby they pretended to dissolve said limited partnership, were had and done with intent to defeat and evade the provisions of the Illinois statutes of limited partnership; that such acts and proceedings were void, and, that said limited partnership was still subsisting at the time judgments were confessed by Fay & Conkey.

3. The Circuit Court erred in its finding, that the said judgments were confessed and creditors' bills filed in the main for the purpose of preferring certain creditors of the limited partnership.

4. The said Circuit Court erred in decreeing that all the property and effects held by the limited partnership of

Boies, Fay & Conkey on the 20th day of August, 1882, and subsequent thereto, and when the said judgments were confessed, were a special trust fund for the payment of the firm's debts ratably among its creditors.

5. That the Circuit Court erred in its finding that Julius K. Graves was indebted to the limited partnership in a sum equal to the assets applied in payment of judgments confessed in favor of the Commercial National Bank of Dubuque, the Dubuque County Bank, and the Importers' & Traders' National Bank.

6. The Circuit Court erred in entering a decree November 17, 1885, in favor of complainant and against the appellant Graves for the sum of $100,796.71, instead of dismissing the bill at complainant's costs.

7. The Circuit Court erred in its finding that the contract of dissolution of the limited partnership of Boies, Fay & Conkey was a pretended one and entered into for the purpose of protecting the limited partner, Julius K. Graves, from liability as such and as indorser for the firm, and to prefer certain judgment creditors.

8 The Circuit Court erred in admitting incompetent evidence upon complainant's behalf as against the appellant, Julius K. Graves, and especially evidence in relation to the manner of conducting business by Fay & Conkey after the dissolution of the limited partnership.

9. The findings of the court were against the evidence and the weight of evidence.

10. The court erred in the admission of incompetent evidence for the complainant, and in overruling the objections thereto of the defendant and appellant, Julius K. Graves, and in the rejection of evidence offered on behalf

of the said appellant, and sustaining complainant's objections thereto.

11. The court erred in all of its findings, and each of them.

PROPOSITIONS OF LAW AND FACT.

Upon the record and the errors assigned, we submit the following propositions of law and fact for the consideration of the court:

1. The limited partnership of Boies, Fay & Conkey was lawfully dissolved, and its assets transferred to Fay & Conkey, as successors, and at the time judgments were confessed such limited partnership had no legal existence and no assets. These confessions, therefore, were not affected by the limited partnership act of Illinois.

2. A bill in equity will not lie under the circumstances of this case in behalf of a simple contract creditor. Judgment must first be recovered and execution issued and returned unsatisfied.

3. The decrees entered in this suit are erroneous and inequitable.

4. The Circuit Court had no jurisdiction whatever to render a decree in this case, for the reason, that four of the necessary defendants therein were and are citizens of the same State as the complainant.

5. The transfers made by Fay & Conkey cannot be held to be a constructive general assignment within the rule laid down by this court in *White* v. *Cotzhausen*.

These propositions cover precisely the same grounds as those stated in the bank's brief, with the exception that the third subdivision of that brief, which raises the question of notice to the bank, is omitted.

To present the evidence and authorities relied upon in support of the above propositions, would amount simply to a re-statement and a re-argument of the law, and the facts fully set forth in the brief and argument filed by us in behalf of the bank.

This would seem to be wholly unnecessary, and we therefore respectfully submit that the decree against Graves should be vacated and set aside, with directions to the Circuit Court either to dismiss the bill or to remand this cause to the State court.

J. M. FLOWER,
Counsel for Appellant.

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Appeals from the Circuit Court of the United States for the Northern District of Illinois, consolidated for purposes of hearing, by order of the Supreme Court.

BRIEF ON BEHALF OF THE FIRST NATIONAL BANK, ONE OF THE APPELLANTS.

By an order of this court entered on the 29th day of October, 1888, the above appeals were consolidated for purposes of argument and hearing.

The appeal by Graves was taken from a final decree entered against him by the Circuit Court for the Northern District of Illinois in favor of the complainant and appellee, Corbin, on the 17th day of November, 1885, directing

him to pay to the clerk of the said court, for the benefit of said Corbin (and of such other creditors of the limited partnership of Boies, Fay & Conkey as should prove their right to share therein) within thirty days from the entry of the decree, the sum of $100,796.71; and that in case of failure to pay said sum within the time limited, execution should issue therefor.

On the same day a separate joint decree was entered against James M. Flower and others, composing the law firm of Flower, Remy & Gregory, directing them to pay to the clerk within thirty days thereafter the sum of $9,866.57, and in default thereof, that execution issue.

The amount of the latter decree was made up of attorneys' fees, with interest added, authorized by warrants of attorney, upon which judgments had been confessed, which fees the court found were received and retained by Flower, Remy & Gregory as compensation for services out of the funds realized from the sale and collection of the assets of Boies, Fay & Conkey.

The court, in its said decree, reserved all matters not therein decreed upon, including the right to decree against other creditors in whose favor judgments had been confessed, for further direction and decree, and leave was given to the complainant to apply at the foot of said decree for such further order as might be necessary to the due execution thereof, or as might be required in relation to any matter not finally determined by it.

The decree further provided for an order of reference to one of the masters of the court to take proof of debts due to creditors of the limited partnership of Boies, Fay & Conkey, and report the same with the testimony into court, and also ordering that one Bradford Hancock, as receiver in certain creditors' suits, deliver over to the

receiver in this cause, all books of account, papers, etc., and that he pay to the clerk of the court all moneys in his possession, as such receiver, within five days, and that he settle his account without delay.

On the 3d day of May, 1888, upon the motion of Corbin, the complainant, the Circuit Court entered a final decree against the appellant, the First National Bank of Chicago, for the sum of $50,721.95, and directed that the same should be paid to Robert E. Jenkins, the receiver in this suit, within thirty days from the entry of the decree, and that, if not paid within said time, execution issue against said bank.

Separate appeals were duly perfected upon the two decrees entered upon the 17th day of November, 1885, the said Graves filing his bond as security for costs only, and the said Flower, Remy & Gregory filing a bond for costs and the payment of the decree against them in the event that the said decrees should be affirmed. Upon the perfecting of said appeals, the record was duly filed in this court October 11, 1886.

The First National Bank of Chicago also prayed an appeal from the decrees rendered against it, May 3, 1888, and gave bond in the sum of $60,000, as required by the order of the court, and filed the record upon its appeal in this court, on the 17th of October, 1888.

Prior to the time of preparing the record upon the last appeal, and on the 11th day of September, 1888, the parties to the suit stipulated that the appeal of the bank from the decree rendered against it might be consolidated and heard with the separate appeal taken by Julius K. Graves, and the joint appeal taken by Flower, Remy & Gregory, from the decrees rendered against them on November 17, 1885, and that the record filed by them on said

appeals should be regarded as, and made a part of, the record in the Supreme Court upon the appeal by the said First National Bank of Chicago; and that the clerk of the Circuit Court should make a record of all subsequent proceedings, pleadings, depositions, opinions, orders, etc., had, made or filed in that court since the entry of the said decrees against Graves and Flower, Remy & Gregory, up to and including the entry of the decree against the First National Bank of Chicago; and that the said record so made, with the said stipulation and the record filed in the Graves case, as aforesaid, should be taken together and constitute the record and the return by the clerk upon said appeal by said First National Bank of Chicago.

On the 29th day of October, 1888, the appeal of Flower, Remy & Gregory was dismissed, leaving the appeals of Graves and the First National Bank to be heard together, in pursuance of the stipulations and order of this court consolidating the same.

A motion was also made to extend the provisions of section nine of the tenth rule of the Supreme Court to these causes as consolidated, which motion was granted on the 5th of November, 1888. Under this rule the First National Bank prepared and filed a statement of errors relied upon by it, and designated such portions of this record upon the appeal of Graves and of said bank as it deemed necessary for the consideration of the errors assigned This was followed by suggestions of additional parts of the records which the appellee regarded as material and necessary to be printed, which, so far as the record in the Graves case is concerned, were so extensive as to make it advisable in the opinion of the counsel for the appellant to print the entire record in that case. The record in the First National Bank case proper (No. 980)

has been prepared and printed in accordance with the suggestions of the respective counsel of the parties, and only includes a part thereof.

STATEMENT AS TO THE PLEADINGS AND PROCEEDINGS.

This action was commenced in the Circuit Court of Cook County, Illinois, on the first day of March, 1883. The bill was filed by Chester C. Corbin, of Massachusetts, against William A. Boies, Benjamin B. Fay, Lucius W. Conkey and Julius K. Graves, who were the principal defendants, and who were alleged to be members of a limited partnership in which the three defendants first above named were general partners and Julius K. Graves a special partner, and also against a large number of judgment creditors in whose favor judgments had been confessed by Fay and Conkey, two of the parties above named—Julius K. Graves and the First National Bank of Chicago being two of such judgment creditors.

The bill alleges the purchase by complainant, on the 15th of November, 1882, of two notes of the limited partnership of Boies, Fay & Conkey, both dated October 30, 1882, for the aggregate sum of $3,751.13, payable four months after date; that, on the 30th day of March, 1882, Boies, Fay & Conkey and Graves duly formed a limited partnership, under an act of the Legislature of the State of Illinois, entitled, "An act to revise the law in relation to limited partnerships." The articles of partnership are set forth in the bill, and state that the style of the partnership, or of the firm, was Boies, Fay & Conkey, the business that of wholesale grocers; that Boies, Fay & Conkey were the general partners, and Julius K. Graves a special; that the special partner had contributed $50,000 to the partnership, which was to commence on the 30th

day of March, 1882, and terminate on the 30th day of March, 1887; the said articles were duly acknowledged, filed and recorded and published, as required by law; that the firm commenced business at the time agreed upon, and carried on the same until January, 1883; and that, during that time, it contracted debts to divers persons of about the sum of $400,000; that, about the 13th of January, 1883, the liabilities then being of the amount stated, the assets of the concern were no more than sufficient to pay fifty cents on the dollar; that on the second day of December, 1882, the persons composing said firm, knowing the partnership to be insolvent, and intending to delay the creditors thereof, and in contemplation of insolvency and with intent to prefer certain of their creditors, and to evade the provisions of the limited partnership act, pretended to dissolve said limited partnership, and caused to be filed and recorded in the office of the county clerk a paper purporting to be a dissolution thereof, and complainant alleges that the same was a device to evade the provisions of the act; *that thereafter Fay and Conkey assumed the entire control of the business and pretended to carry it on under the firm name and style of Fay & Conkey, and assumed to be the owners of all the property and effects of the limited partnership, and that the said Boies and Graves pretended to release and convey to Fay & Conkey all their interests in the assets and property thereof, but that the same was fraudulent and void as against the creditors of the limited partnership, and made with intent to defraud creditors.*

The complainant further alleges that the assets of the limited partnership were pledged to the payment of the debts of said limited partnership, ratably and in proportion to the amount due to each of its creditors, and that it

was the duty of said partnership, as soon as they had knowledge of insolvency, or at the time of the pretended dissolution thereof, to have appointed a competent trustee to take possession and charge of the assets, convert the same into money, and distribute the same ratably; that on the 22d day of January, 1883, in pursuance of the fraudulent scheme and contrivance on the part of themselves and said Boies and Graves, Fay & Conkey executed a note to the First National Bank of Chicago for the sum of $40,000, with warrant of attorney authorizing the confession of judgment thereon, with five per cent. attorney's fees, and that judgment was entered in the Superior Court of Cook County on the same day in favor of said bank for $42,000. It is also alleged that six other judgments were confessed in the said court in favor of other creditors by said Fay & Conkey for various amounts, and that on the same day judgments by confession were also entered in favor of the Commercial National Bank of Dubuque, Iowa, in the Circuit Court of the United States for the Northern District of Illinois for the sum of $14,250, and also on the same and following days in January, 1883, fourteen other judgments were confessed in the same court in favor of various creditors for various amounts; all of which judgments were entered upon notes and warrants of attorney annexed thereto executed by Fay & Conkey, bearing date on January 22d, or subsequent thereto, and containing a provision for the payment of five per cent. attorneys' fees; that executions were immediately issued on each of the judgments in the said Superior Court of Cook County against the goods and chattels of Benjamin B. Fay and Lucius W. Conkey, and that the same were immediately levied upon a large quantity of merchandise of the value

of about $75,000, being, as alleged, the property and a part of the assets of the limited partnership of Boies, Fay & Conkey; that the property seized upon said executions had been sold by the sheriff, who realized therefrom about $54,000; that on the 23d day of January, 1883, executions were issued and returned unsatisfied upon the first four judgments recovered in the Circuit Court of the United States, and thereupon a creditors' bill was filed asking for the appointment of a receiver to take possession of the property and estate of said Fay & Conkey; that one Bradford Hancock was appointed such receiver, and immediately upon his appointment the books of account, bills receivable, choses in action and assets, as alleged, of the said *limited* partnership, were delivered by the said Fay & Conkey to the said receiver, who then had possession of the same and was duly collecting the debts, accounts and choses in action alleged to be due to said limited partnership, which said choses in action amounted to more than the sum of $210,000, as the complainant alleged; that a second creditors' bill was filed shortly thereafter in behalf of seven other of the judgment creditors in whose favor judgments had been rendered in said Circuit Court for said Northern District of Illinois, and the same receiver appointed in said suit. It is charged in said bill that the said judgments by confession entered in the Circuit Court of the United States for the Northern District of Illinois were entered in pursuance of a fraudulent scheme and contrivance on the part of Boies, Fay & Conkey and Graves to hinder and delay creditors, and to evade the provisions of the limited partnership act, and to prefer persons in whose favor the judgments were rendered.

It is further alleged that five per cent. was added to each of the judgment notes for attorneys' fees, and that

they amounted in the aggregate in all of the judgments to $10,657.65, as a compensation to the attorneys for entering up said judgments; which fees are alleged to have been exorbitant and excessive, and to have been allowed for the purpose of absorbing to that extent the assets and property of said partnership, and that Fay & Conkey are interested therein and had a secret agreement with the attorneys for a division of the same.

The bill further charges that the judgments in favor of the First National Bank and of the other judgment creditors were each of them largely in excess of the amounts actually due to them, respectively, at the time of the entry thereof; that Fay & Conkey knew, when they confessed the judgments, that the limited partnership was insolvent, and by so doing intended to prefer the creditors in whose favor judgments were confessed; that such confessions were unlawful acts on the part of Fay & Conkey, and were prohibited by the limited partnership act of Illinois, and that the same and all acts done in pursuance thereof, or thereunder, were utterly void and of no effect.

It is further charged that the giving of such judgment notes, and the entry of judgment thereon, were without the knowledge of the persons in whose favor the same were made and entered, until after said judgments had been rendered; that the property taken by the sheriff upon executions, and the property and choses in action transferred to Bradford Hancock, as receiver, constituted the whole of the property, assets and effects of the limited partnership.

Prayer for relief, for an injunction and summons.

On the 2d day of April, 1883, the First National Bank filed its petition in the Circuit Court of Cook County, setting forth that there was a controversy in this

suit between the petitioner, who was a citizen of the State of Illinois, and the complainant, Chester C. Corbin, a citizen of the State of Massachusetts, which was wholly between citizens of different States, and could be fully determined as between them, and prayed that the cause might be removed to the Circuit Court of the United States for the Northern District of Illinois. An order was, accordingly, entered to that effect, and the case transferred.

On the 7th day of May, 1883, the First National Bank of Chicago and other defendants filed a general demurrer to said bill, and the defendants, Boies, Fay & Conkey, also filed a plea setting up the fact that the said limited partnership was duly terminated and dissolved by and between the parties by mutual consent on the 17th day of October, 1882; that notice of such dissolution was duly recorded in the office of the clerk of the county of Cook as required by law, and that the same was also duly published six successive weeks, commencing December 2, 1882, in a newspaper of general circulation in Cook County, Illinois, pursuant to the statute. The demurrer and plea were subsequently argued and overruled by the Circuit Court, and the defendants required to answer.

The First National Bank of Chicago filed a separate answer to said bill, admitting the execution and delivery of a judgment note for $40,000, by Fay & Conkey, the entry of judgment thereon for $42,000, the issue of execution, levy and sale, and that it had received an amount sufficient to pay the judgment in full before the commencement of this suit; that the consideration for the said judgment so recovered by said bank was the paper of the firm of Fay & Conkey, previously discounted and held by it in the ordinary course of business; that the said judgment notes

were received by the bank in good faith, and judgments entered thereon with its approval and by its direction; that it had no knowledge as to the organization of the limited partnership of Boies, Fay & Conkey, but presumes the allegations in that respect to be true; that it knew nothing whatever of the circumstances relating to its dissolution except as advised by said bill and the general knowledge on the subject which was known to the commercial and financial world from and after the 2d day of December, 1882; that after the 2d day of December, 1882, all its dealings in relation to the discount of paper, etc., were had with the firm of Fay & Conkey, and not with the firm of Boies, Fay & Conkey; that it had no knowledge as to the fraud charged upon the part of the defendants, Boies, Fay & Conkey and Graves, and was in no respect a party thereto, if such fraud was contemplated or practiced, and it claims that it was in no manner affected thereby; that it had no knowledge as to the other judgments alleged to have been confessed in favor of other creditors, except as advised by said bill, nor did it know what the consideration was for the notes given by Fay & Conkey, upon which said judgments were confessed; that the warrant of attorney set forth in the bill was a form in common use in the city of Chicago and had been for years, and that the provision contained therein for the payment of five per cent. attorneys' fees was usual and customary, and that the fees recovered in the judgment in its favor were retained by its attorneys for services, and said fees were not included in said judgments for the purpose of absorbing, in any manner, the assets of Fay & Conkey.

The defendant Boies also filed a separate answer, in which he admitted the formation of said limited partnership, and stated that its business was carried on from the

time of its organization, in March, 1882, until the 17th day of October, 1882, and denied that the same was continued until January, 1883. He also denied the allegation as to the indebtedness of the firm and the fact that it was insolvent, or that any dissolution was had with the intent to hinder and delay creditors, or to prefer creditors, or to evade the provisions of the limited partnership act. He alleges the facts in relation to the dissolution to be, that on the 17th of October, being desirous of withdrawing from business, he attempted to make an amicable arrangement for that purpose, and threatened to file a bill unless he was permitted to withdraw; that negotiations were had between him and the other members of the firm, by which, in consideration of the sum of $5,500—being the estimated value of his interest in the business over and above all its debts and liabilities—he withdrew from the firm, and took the notes of Fay & Conkey for $5,500 in full payment of his interest, and thereupon conveyed to Fay & Conkey all his interest in the assets of the firm, and Fay & Conkey assumed and agreed to pay the obligations thereof, and protect and save him harmless therefrom; that he received no money at the time of his withdrawal, nor subsequent thereto, nor had anything ever been paid to him upon account of said notes.

He sets up in his answer the notice of dissolution of the limited partnership as the same was published, commencing December 2, in the Chicago Legal News Company, and alleges that the said notice operated to dissolve the partnership relations between himself and his co-defendants, Fay, Conkey and Graves, and that since the 17th of October, 1882, he had had no interest whatever in the said business or assets, nor in the management thereof, and he alleges that he is in no manner responsible for

debts contracted by it since that time; that the dissolution was made in good faith, with no intent to delay creditors or embarrass them, nor was it a device to evade the provisions of the limited partnership act, or facilitate in any manner the giving of preferences to any of the creditors of said firm; that after the said 17th day of October, 1882, the defendants, Fay & Conkey, assumed to be, and were in fact, the owners of all the property, assets and effects of the limited partnership, and were liable for the payment of all its debts and liabilities; that, prior to the time of the dissolution, he had no knowledge whatever of the insolvency of said limited partnership, nor did he contemplate, nor did any member of the firm contemplate, so far as he knew, any acts of insolvency or preference; that he knows nothing whatever as to the subsequent acts of Fay & Conkey in relation to the entry of judgments and filing of creditors' bills, except as set forth in said bill; nor does he know anything of the consideration of the notes given and judgments confessed by them. He says that none of the subsequent proceedings had or entered into by Fay & Conkey relating to such judgments and the creditors' suit were entered into in pursuance of any scheme or contrivance upon his part with the said Fay, Conkey & Graves, or either of them. He knows nothing with reference to the five per cent. attorneys' fees, or for what purpose they were included He admits that Flower, Remy & Gregory acted as his attorneys for the purpose of obtaining a settlement with his copartners. He denies generally every matter and thing set forth in said bill not otherwise specifically admitted or denied.

The defendants, Fay & Conkey, file a joint answer admitting the organization of the limited partnership; thta

it commenced business as such, and continued to carry it on until the 17th of October, at which time an agreement was made for dissolution of copartnership by mutual consent; that a notice of dissolution was drawn up on that day and signed; that on the second day of December it was recorded in the clerk's office of Cook County, and published in the Chicago Legal News, commencing on the 2d day of December, 1882, and completed on the 13th day of January, 1883; that thereby the limited partnership became and was, in law and in fact, legally dissolved; that, at the time that the notes were given, judgments confessed and bills filed, as alleged in the bill of complaint, the title to the assets of said limited partnership of every description, by virtue of the assignments and acts of its members, had legally passed to and vested in them, and that they had assumed and agreed to pay all the debts and liabilities of the limited partnership, and that they had, in fact, discharged and paid before the completion of such publication fully three-fourths of said indebtedness; that since the dissolution defendants had purchased large quantities of merchandise, and subsequently to the first publication of said notice incurred liabilities in the firm name of Fay & Conkey, so that the character of the assets in their possession at the time of the confession of said judgments had materially changed, the bulk of the same having been bought in the firm name of Fay & Conkey, and the greater amount of the indebtedness due to them being for goods sold in their firm name; that at the time of the entry of judgments, not over one-fifth of the indebtedness then existing was originally the indebtedness of Boies, Fay & Conkey, and not to exceed one-fifth of the assets then on hand had been received by them from the firm of Boies, Fay & Conkey. They admit that the

limited partnership while in business contracted debts and incurred obligations, but deny that the same amounted to $400,000 on the 13th of January, 1883. On the contrary, they say that such indebtedness did not at that time exceed $90,000. They deny also the allegations of the bill that the dissolution was made with knowledge of insolvency, or that it was done with intent to hinder or delay creditors, or to prefer creditors of said limited partnership, or to evade the provisions of the limited partnership act. They say that the dissolution was brought about by the dissatisfaction of one of their partners, William A. Boies, who insisted upon retiring from the firm, and threatened to file a bill for an accounting unless some settlement was made with him; that in consequence thereof they did settle with Boies, and gave him their paper for $5,500, and thereupon he withdrew from said firm, and the business was subsequently continued in the name of Fay & Conkey; that at the same time Julius K. Graves, the limited partner, also concluded to retire, and an agreement was entered into with him by which, in consideration of the fact that his contribution of capital should remain, they gave him their paper for the amount of said contribution, and he withdrew from said firm, and both Boies and Graves transferred to them all their interest in the assets belonging to said partnership, and the defendants assumed and agreed to pay its liabilities; that neither Boies nor Graves at any time subsequent to the dissolution, nor at the time of dissolution, received or withdrew from the business a dollar of money or assets, and that neither of them had been paid anything on the notes of the defendants given to purchase their interests; that at the time of said dissolution and the giving of said notes, they fully believed that the partnership was solvent and that its

assets were largely more than sufficient to pay its debts; that they took possession of said business, commenced and continued to carry it on until the 22d day of January, 1883, creating new debts in the name of Fay & Conkey, and paying off the old debts of Boies, Fay & Conkey, buying merchandise upon their own credit and selling for their own account, renewing loans at bank contracted by Boies, Fay & Conkey, by giving their own paper in lieu of the same, and so changed the nature and character of the assets of said limited partnership and its liabilities that it was impossible to determine what there is or was remaining at the time of their suspension of the original assets received by them from said limited partnership, and what remained unpaid of the original indebtedness assumed by them.

They allege that all allegations of the bill charging them and their former partners, Boies and Graves, with intent to hinder or delay creditors by reason of said dissolution, or with an attempt to prefer creditors, or to evade the provisions of the limited partnership account, to be wholly false and untrue. They admit, that after the dissolution they assumed control of the business, carried it on in the firm name of Fay & Conkey, and assumed to be, and allege that they were in fact, the owners of all its partnership property and effects, and that Boies and Graves in fact released and conveyed to them all their right, title and interest in and to the same. They admit that, on the 22d, 23d and 26th days of January, they executed notes and confessed judgments in favor of various creditors named in the complainant's bill, and for the amounts therein named; that executions were issued and assets levied upon and sold, realizing about $54,000; that creditors' bills were filed in the United States Court upon judgments con-

fessed in said court; that Hancock was appointed receiver; that an assignment was made to him under the order of court by the defendants, Fay & Conkey; that the master in chancery, before whom the defendants were required to appear and execute said assignment, was sick; and that they went to his place of residence and acknowledged the same before him, and delivered such assignment to the receiver. They deny that the notes were given in excess of what was actually due to the payees in said notes named. They admit the giving of warrants of attorney to confess judgment with five per cent. attorneys' fees, but say that the judgment notes were in the usual and customary form, and that the provision for the payment of attorneys' fees in said warrants of attorney was usual and customary. They deny that the attorneys' fees were included in said judgments for the purpose of absorbing the assets, and say that they had no interest whatever in said fees, nor was there any agreement by which they were to receive a part thereof.

Further answering, they say that, up to within a day or two of the time of the confession of judgments, they had no knowledge of their insolvency, and no reason to believe that they were unable to carry on their business successfully. They further deny that judgments were entered without the knowledge and consent of the persons mentioned as plaintiffs, or that any of the notes given by them on the 22d of January, 1883, or subsequently, were given to carry out and perfect any fraudulent scheme entered into by them with Boies and Graves, as mentioned in the bill. On the contrary, they say that no such scheme was ever made or entered into at any time.

Julius K. Graves, the special partner, also filed a sep-

arate answer, in which he admits the organization of the limited partnership and the conduct of the business thereunder, but says that the firm was dissolved by mutual consent on the 17th of October, 1882, and the assets turned over to Fay & Conkey, two of its members, as successors of said firm; that William A. Boies, one of the general partners, and the defendant, being the special partner, withdrew at that time; that in consideration of his withdrawal he received the notes of Fay & Conkey for the amount of special capital in said business, no part of which has ever been paid; that neither at the time of said dissolution nor at any time since did he withdraw any money or assets from business, but that his investment of capital remained subject to the payment of debts, and still so remains. He denies all the allegations of the bill in respect to the alleged insolvency of the limited partnership, and especially all allegations charging him and the members of said firm with bad faith in the matter of making such dissolution, or with intent to hinder and delay creditors, or to prefer creditors, or to evade the provisions of the limited partnership act; that the partnership was dissolved as it lawfully might be pursuant to the laws of the State of Illinois, in good faith, and chiefly, in the first instance, because one of the general partners was dissatisfied and wanted to get out of the business, and he did not care to continue in it himself; that notice of dissolution was duly published on the 2d day of December, 1882; that the publication became complete on the 13th day of January, 1883; that in the meantime Fay & Conkey, as the successors of the firm, were in possession of the said assets, carrying on said business and incurring new obligations, paying off the obligations of the limited partnership of Boies, Fay & Conkey which they had as-

sumed, so that at the time of the confessions of judgments in said bill mentioned, the character of the assets and liabilities had largely changed, the bulk of the indebtedness of Boies, Fay & Conkey had been paid off either in cash or by the paper of Fay & Conkey which creditors had accepted, and that the greater portion of the estate consisted of merchandise purchased by them upon their own credit, and accounts due them from various country merchants for goods sold by them; that after the dissolution of said firm; so strong was his belief in its solvency, he, from time to time, at the request of Fay & Conkey, and for their benefit, indorsed their paper to a very large extent, and continued to do so up to the time that the judgments were confessed; that among the notes so indorsed or guaranteed by him for the benefit of Fay & Conkey were notes held by the First National Bank of Chicago and by Beveridge & Dewey, financial brokers in the city of Chicago. He admits the giving of judgment notes, the confessions of judgments, the levy of executions and the filing of creditors' bills, substantially as set forth in the bill of complaint; that $54,000 was realized upon executions issued out of the Superior Court of Cook County, and that the same was paid over to judgment creditors entitled thereto; that a receiver was appointed in the United States Court, and the assets, except such as were covered by executions in the State courts, turned over to him; that said receiver had made collections, received and paid out large sums of money, pursuant to decrees rendered in the United States Court in said creditors' bills.

Further answering, he says that he has received nothing whatever upon any of the judgments confessed by the defendants Fay & Conkey, and entered in either the Superior Court of Cook County or the Circuit Court of the

United States, nor has he received from them, at any time since the dissolution of said firm, any money or assets belonging to said firm, nor has anything been paid to him on account of the notes given him by Fay & Conkey for the purchase of his interest in the business. He denies every allegation in the bill not otherwise specifically admitted or denied by his answer.

Flower, Remy & Gregory file a joint answer, admitting the organization of the limited partnership and its dissolution, the execution by Fay & Conkey of notes with warrant of attorney, in the form set forth in the bill of complaint, on the 22d, 23d and 26th of January, 1883, the entry of judgments in the Superior Court of Cook County, and in the Circuit Court of the United States for the Northern District of Illinois, the levy of executions by the sheriff of Cook County, the filing of creditors' bills upon unsatisfied executions in the United States Court; that $54,000 was realized upon sales on execution, and paid over to the First National Bank of Chicago and to Beveridge & Dewey, assignees of Julius K. Graves, who held a second execution lien against the property. They further set out that a final decree had been entered in the creditors' suit of the Commercial National Bank and others, directing the receiver to pay the amounts of their respective judgments, and that, in pursuance of said decree, the receiver had paid said judgment creditors the full amount thereof, and taken their receipts; that, as to the second creditors' bill, filed by the Bay State Sugar Refining Company and others, the receiver, in pursuance of a like decree, had paid to each of the judgment creditors therein referred to, twenty per cent. of the amount thereof. They admit that each of the judgments by confession included a sum equal to five per cent. of the original claim for attorneys'

fees, but deny that the sum was exorbitant or excessive as compensation, or unwarranted, or that the same was so entered up for the purpose of absorbing the assets and property of the limited partnership, or that Fay & Conkey were interested in any manner therein; that since the entry of judgments by confession they had not been the attorneys of Boies, Fay & Conkey, but admit that they were attorneys for Graves for the purpose of entering judgments in his favor, which he subsequently assigned to the First National Bank of Chicago, and Beveridge & Dewey. They deny that any of the judgment notes were taken or judgments confessed without the knowledge of the creditors in whose favor said notes were executed and judgments taken, and, as to the other matters, they have no knowledge or information sufficient to form a belief, and deny the same.

All of the other judgment creditors who were made parties to the bill, filed their answers in due season except the Commercial National Bank of Dubuque, the Dubuque County Bank, Iowa, and the Importers and Traders' Bank of New York, whose judgments had been fully paid, and of whom the Federal Court was unable to get jurisdiction.

After the entry of final decrees in favor of Corbin against Graves and Flower, Remy & Gregory, and the appeals therefrom had been perfected, certain other proceedings were had in the Circuit Court, consisting, chiefly, of an order of reference to E. B. Sherman, master in chancery, to ascertain and determine the total amount of the indebtedness of the limited partnership of Boies, Fay & Conkey; and also to settle and adjust the accounts of Bradford Hancock, the receiver, in the two creditors' suits of the Commercial National Bank *et al.* against Fay *et al.*, and the Bay State Sugar Refining Company *et al.*

against the same. This reference to the master in no manner affected the First National Bank of Chicago, except as to two certain deposits amounting in the aggregate to $625, made for the purpose of guaranteeing the bank against loss upon bonds furnished by them upon sundry attachment proceedings brought by Boies, Fay & Conkey, and then pending in the Territory of Dakota. As these sums form no part of the decree entered against the bank, it is wholly unnecessary to consider the same. After the report of the master had been filed upon the matters referred to him, and after the return of an execution unsatisfied against Julius K. Graves, upon the decree against him of $100,796.71, and on the 23d day of January, 1888, a petition was filed herein by Corbin, the complainant, and a large number of creditors of the limited partnership, representing an aggregate amount of claims of $125,737.34, which had been proved up before the master under the decree of November 17, 1885, setting up in substance that all efforts to collect the decree against Julius K. Graves had failed, and that, inasmuch as the court had reserved the right, under its said decree, to enter further decrees against any of the parties who had obtained preferences as creditors of the limited partnership, upon judgments confessed by Fay & Conkey, they insisted, that under the proofs already taken, they were then entitled to a decree against the First National Bank of Chicago for the sum of fifty thousand dollars, forty thousand of which was realized by said bank as an unlawful preference under the limited partnership act of the State of Illinois, by a sale of the firm's merchandise upon execution issued in its favor on the judgment confessed January 22, 1883, by Benjamin B. Fay and Lucius W. Conkey, and praying that a decree

might be entered against the bank, requiring it to pay within thirty days to Robert E. Jenkins, receiver, the sum of fifty thousand dollars with interest. We deem it wholly unnecessary to do more than call the attention of the court to the presentation of this petition, for the reason that it was conceded and is conceded that the decrees previously entered were wholly insufficient to pay the claims which had been proved up against Boies, Fay & Conkey. There is no part of the record, subsequent to the entry of the Graves decree, that we deem material for this court to consider, except the petition to which we have just alluded (*p. 54, Bank Record*), the opinion of the Circuit Judge, (*p. 60, Bank Record*), and the final decree against the bank (*p. 68, Bank Record*). So far as the proceedings against Bradford Hancock, the receiver in the creditor's suits, are concerned, it is sufficient to say that the bank was not a party to any of the creditors' bills, and had no interest in that controversy, or in the settlement of the receiver's account; and as to the reference, for the purpose of establishing claims against the limited partnership, it had no interest, it being conceded that the claims were sufficient to justify a decree against the bank, if the complainant was otherwise entitled to one.

STATEMENT OF FACTS.

The substantial facts in this case, as they appear from the admissions in the pleadings and from the depositions and documentary evidence submitted to the court, are as follows:

Prior to the 30th of March, 1882, the firm of Boies, Fay & Conkey was a general partnership composed of William A. Boies, Benjamin B. Fay and Lucius W. Conkey, which had been doing business for several years

at Chicago, Illinois, as wholesale grocers. Julius K. Graves, a resident of Dubuque, Iowa, and a brother-in-law of Benjamin B. Fay, had been in the habit of indorsing quite largely for the accommodation of said firm. On the 30th day of March, 1882, a limited partnership was formed under the same firm name, between Graves and the three general partners above named, for the purpose of carrying on the same business at the city of Chicago. Graves, as special partner, contributed to the capital stock the sum of fifty thousand dollars. The partnership, by its terms, was to continue for the period of five years. It is charged in the bill, and admitted in the answers, that this partnership was duly organized and all the requirements of the statute fully complied with.

In addition to his contribution as a special partner, Mr. Graves continued to indorse the paper of that firm, for its accommodation, as he had previously done for the general partnership of Boies, Fay & Conkey. At the time of the organization, it was represented to Graves by Fay that the actual capital then in the business was one hundred thousand dollars. On the 1st of August a rough statement seems to have been made out of the business up to that date. Just what the showing was at that time is not apparent—the statement prepared not having been found or put in evidence—although proof was made that there was an apparent surplus of fifty thousand dollars or more. In September, 1882, Fay went East on a short vacation, and during his absence Graves, at his request, occupied his seat and looked after the finances of the firm to the extent of making provision for the payment of any maturing notes that might be presented during such absence. It does not appear that Graves at any other time had any charge of the busi-

ness, or in any way interfered with its management. Some time after Fay's return, and on the 17th of October, 1882, Graves being desirous of withdrawing from the business, an agreement of dissolution was entered into between the general partners and the special, by the terms of which Graves was to withdraw, leaving with his successors the amount of his contribution of fifty thousand dollars, and taking their note therefor, drawing six per cent. interest. This dissolution agreement was reduced to writing, and duly executed and acknowledged by the partners, and was subsequently duly published and recorded. On the 19th day of October, 1882, Boies withdrew from the firm and transferred his interest in the business to his remaining partners, Benjamin B. Fay and Lucius W. Conkey, who, in consideration for such transfer, gave to the said Boies their notes for $5,500, and assumed and agreed to pay all of the obligations of the limited partnership, and to protect and save harmless the said Boies on account of the same. A separate notice of dissolution was drawn up between the three, and publication made in due form. Notices were also sent to parties dealing with the firm, and given to the creditors. On the 4th day of December the firm bank account at the First National Bank was changed from Boies, Fay & Conkey to Fay & Conkey, and thereafter and up to the time of the failure of the concern, all its business transactions, whether in the way of purchases, bank loans, or bank discounts, were made and had wholly and exclusively in the name of the new firm and upon its credit. As between the parties to these agreements, the dissolution took effect as early as the 1st day of November, 1882. Thereafter neither of the retiring partners had anything to do with

the conduct or management of the business, or received any benefit therefrom. No money was paid to Boies at the time that he retired from the firm, or at any subsequent time; nor did he ever receive anything upon the notes given him in settlement for his interest in the business. Graves received nothing at the time of the dissolution of the limited partnership, except the note of Fay indorsed by Fay & Conkey for the amount of his special capital, nor at any subsequent time, with the following exceptions: On the 4th day of December, Fay & Conkey executed to him their note for $766, payable at ninety days, for balance due him for supposed profits to the 30th of October, 1882. On the same day Graves, being at that time a large indorser for the firm, and wanting accommodation himself, obtained the notes of Fay & Conkey for $10,000, which notes, with the note for $766.66 aforesaid, he discounted at the Commercial National Bank of Dubuque, and the same were subsequently merged in the judgment confessed by Fay & Conkey in favor of said bank, and paid from the moneys realized out of the assets of Fay & Conkey. As between Fay & Conkey (or their creditors) and Graves, it is undoubtedly true that these notes should have been paid by Graves, and in a proper suit judgment could be recovered against him therefor. (Graves' record, pp. 365–8.) The dissolution of the limited partnership was published for six successive weeks, as required by statute—the six weeks expiring on the 13th day of January, 1883—and no question has ever been made but that the statutory requirements with reference to such dissolution were fully complied with.

Between the 2d day of December, 1882, and the 20th day of January, 1883, and during all of that time,

the firm of Fay & Conkey, as successors to the business of the limited partnership, were the apparent owners and in possession of its assets. Their purchases after that date were made by them in their own name and upon their own credit. As the claims of Boies, Fay & Conkey matured, they were paid in cash and retired. Notes maturing at the banks with which they were doing business, and particularly at the First National Bank of Chicago, and the Importers and Traders' Bank of New York, were also paid in cash by check of the firm of Fay & Conkey, and new discounts were made for that purpose with said banks and others upon the notes of Fay & Conkey. On the 20th day of January, 1883, all of the paper of Boies, Fay & Conkey held by the Importers and Traders' Bank, or any other foreign banks, had been retired, and all of the paper of the limited partnership held by the First National Bank, with the exception of one or more notes secured by warehouse receipts as collateral, had also been retired. No one seems to have regarded the firm as insolvent prior to the 20th day of January, 1883, although during the week ending on that day, or shortly prior thereto, the vice-president of the First National Bank had some slight doubt as to its solvency, and had advised Graves to investigate the situation.

At the time of the dissolution of the limited partnership the appellant, Graves, was indorser upon the paper of that firm to the extent of eighteen to twenty thousand dollars, all of which paper was retired on or before the 20th of January. In the meantime, however, he had made himself responsible upon the paper of Fay & Conkey to the amount of at least seventy thousand dollars—he testifies to eighty-five thousand dollars—twenty-seven thousand dollars of which paper, with his indorsement or acceptance,

was held by the First National Bank of Chicago, fifteen or sixteen thousand dollars by the Importers and Traders' Bank of New York, seventeen thousand five hundred dollars by Beveridge & Dewey, note brokers at Chicago, and the balance by banks at Dubuque, who had discounted the same. About twenty thousand dollars of this paper was indorsed by Graves during the week ending January 20th upon representations made by Fay to him as to the total amount of the indebtedness of the concern and the amounts which would be required to carry it through the month of January. On the 20th of January Fay asked Graves to indorse fifteen thousand dollars more of paper for him, which Graves refused to do, and asked to have the bookkeeper of the firm sent to him with a statement of its situation. In an interview with the bookkeeper, it was ascertained by Graves that the total indebtedness of the firm was one hundred thousand dollars larger than Fay had represented it to be, and that the amount required to carry the firm through the month of January was forty thousand dollars larger than the representations had been. As the result of the information so obtained, Graves insisted that he should be protected upon the indorsements which he had made, and an interview was then had on that afternoon, at the office of Flower, Remy & Gregory, between Graves and Fay & Conkey, at which it was agreed that judgment notes should be given to the banks holding the notes of Fay & Conkey with Graves' indorsement, and that a note should also be given to the First National Bank of Chicago to secure the liability of that firm to said bank. Up to that time Graves had apparently been acting in the utmost good faith, and loaning his name liberally to the firm with full confidence in their ability to conduct the business and protect him.

The same is true of the dealings of the bank with that firm. On the 2d day of December, 1882, being the day upon which notices of dissolution were first published, the liabilities of Boies, Fay & Conkey to the First National Bank amounted to the sum of eighty-seven thousand nine hundred eight dollars and twenty-five cents, of which amount twenty thousand dollars was the unsecured paper of that firm, and twenty thousand dollars was paper indorsed by Julius K. Graves. On the 22d day of January, 1883, the indebtedness of Fay & Conkey to the bank had increased to $118,685.98, of which $25,000 was the unsecured paper of Fay & Conkey, and $27,000 the paper of Fay & Conkey, indorsed by J. K. Graves; so that the bank indebtedness was increased between those two dates to the extent of $30,777.73.

On the 22d, 23d and 26th days of January, 1883, Fay & Conkey executed their judgment notes to various creditors for amounts due them, which notes provided for the payment of five per cent. attorneys' fees, and upon which judgments were confessed upon the dates upon which they were given for the face of said notes, with said attorneys' fees added, and costs of suit.

Seven of these judgments were confessed in the Superior Court of Cook County, amounting in the aggregate to the sum of $95,965.83. The first judgment was in favor of the bank for the sum of $42,000, and the second one in favor of Julius K. Graves, for $18,375. The latter judgment was assigned by Graves to Beveridge & Dewey as collateral security for $17,500 of Fay & Conkey's paper, indorsed by Graves and held by them. These judgments were levied upon the tangible assets of Fay & Conkey, consisting of merchandise and fixtures. About $54,000 was realized by sale upon executions, and

the same applied first, in discharge of the bank judgment, and the balance applied upon the Graves judgment, which had been assigned to Beveridge & Dewey. These payments were so made and applied upon said judgments two days before the filing of the bill in this suit. Nothing was ever realized upon any of the other judgments entered in the State court.

The four judgments first confessed in the United States Court amounted in the aggregate to $72,307.50, and were as follows: In favor of the Commercial National Bank for $14,962.50; the Dubuque County Bank, $12,495; the Importers and Traders' Bank, $16,800; and Julius K. Graves, $28,350. These judgments were entered on the 22d day of January, and executions were returned unsatisfied, and a creditor's bill was filed on the 23d day of January, 1883, in which Bradford Hancock was appointed receiver, and on the same day and under an order of court, an assignment was made to him as such receiver by Fay & Conkey of all their assets. The bill was taken as confessed, and a decree entered on the 10th day of March, 1883, in favor of the complainants for the amounts of their respective judgments aforesaid, directing the receiver to satisfy the same from moneys received or to be received by him from the assets in his hands. On the same day the receiver paid to the said judgment creditors, or their attorneys, the sum of eighty per cent. of such judgments, with five per cent. attorneys' fees and costs, and on the 26th day of March, he paid the balance of said judgments. Upon the 24th day of January a second creditors' bill was filed against Fay & Conkey in behalf of the following creditors, in whose favor judgments had been confessed, and upon

which executions had been returned unsatisfied, as follows, to wit:

The Bay State Sugar Refining Company -	$10,500.00
A. F. Shumway - - - - -	7,339.50
A. B. Robinson - - - - -	1,155.00
The First National Bank of Westboro, Mass.	12,600.00
Hiram Sheldon - - - - - -	5,755.00
Martha J. Fay - - - - - -	3,885.00
Walter Potter - - - - - -	4,515.00
Making a total - - - - -	$45,749.50

On the same day Bradford Hancock was appointed receiver, and on the 10th of March a final decree was also entered in favor of the several judgment creditors for the amounts due them respectively as aforesaid, and the receiver was directed to pay said judgments, or such portion thereof as he might be able to pay, out of the assets. On the 14th day of April the said receiver made a payment to each of said creditors of twenty per cent. of their respective judgments, and also the attorneys' fees included in said judgments, being five per cent. of the face thereof. All of these payments to creditors, except the one last above referred to, were made prior to the removal of this cause into the United States Court.

The record from the State Court was filed in the office of the clerk of the United States Circuit Court on the 11th day of April, 1883. The petition of the First National Bank for the removal of said cause, sets out that the complainant, at the time of the commencement of his suit, as well as at the time of said removal, was a citizen of the State of Massachusetts, and that the petitioner was a citizen of the State of Illinois; that certain other defendants were citizens of the States of Illinois, Iowa, New York, Ohio, Michigan, Wisconsin and Colorado; and that

four of the defendants, to wit: the Bay State Sugar Refining Company, the First National Bank of Westboro, Alvin F. Shumway and Walter Potter, were at the time of the commencement of the suit, and then citizens of the State of Massachusetts, and that there was a controversy wholly between citizens of different States, and which could be fully determined as between them, to wit: between the petitioner, the First National Bank, a citizen of the State of Illinois, and the complainant, Chester C. Corbin, a citizen of the State of Massachusetts. The transfer was made upon the ground that there was a separable controversy wholly between these two parties, and jurisdiction was entertained and held on that ground. (See record in Graves case, page 32.)

In its final decree against Graves, the court, among other things, found that judgment notes were given to the various creditors named in the bill for the amounts therein specified; that judgments had been entered thereon, as alleged, including attorneys' fees; that payments had been made to the Commercial National Bank and the other creditors included in the first creditors' bill, in full of their judgments; that twenty per cent. had been paid upon each of the judgments hereinbefore mentioned, and included in the second creditors' bill; that the attorneys' fees in all of said judgments had been paid to, and retained by, Flower, Remy & Gregory, as attorneys' fees for entering the same, and that all of said notes, judgments and creditors' bills were made, taken, brought and prosecuted with the intention of defrauding the creditors of the limited partnership of their just rights. Thereupon the court decreed that all of the property and effects held by the limited partnership on the 20th day of August, 1882, and subsequent thereto, and when the said judgments were con-

fessed, were a special trust fund for the payment of the firm debts ratably among its creditors, and further decreed the payment by Graves of the sum of $100,796.71, being the amount received by him out of the assets of the partnership and the sums paid to the *Commercial National Bank, of Dubuque, the Dubuque County Bank* and the *Importers & Traders' National Bank* out of said assets, with interest at six per cent. from the date of each payment respectively. It further decreed that Flower, Remy & Gregory should pay for the benefit of the complainant and other creditors the sum of $8,559.80, with interest at six per cent., amounting to the sum of $9,886.57; that Fay should pay $1,014.48 and interest; that Conkey should pay $1,349.48 and interest. No decree was entered at that time against any of the other judgment creditors who had received payments out of the alleged special trust fund, and no other decree has ever been entered against any of said judgment creditors except the one against the First National Bank, upon which this appeal is pending.

The judgment note given by Fay & Conkey to the First National Bank bears date on the 20th of January, 1883, is marked in the Graves record, "Exhibit D," and is found at page 262, and reads as follows:

"EXHIBIT D."

$40,000.00. CHICAGO, January 20, 1883.

On demand, for value received, we promise to pay to the order of The 528 First National Bank of Chicago, forty thousand dollars, at their office in Chicago, with interest at eight per cent. per annum.

And, to secure the payment of said sum, I authorize, irrevocably, any attorney of any court of record to appeal for me in said court, in term time or in vacation, at any time hereafter, and confess a judgment without process, in favor of the holder of this note, for such amount as may appear to be unpaid thereon, with costs and five per cent. attorneys' fees, and to waive all errors in any such proceedings, and consent to immediate execution upon said judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof.

(Signed) BENJAMIN B. FAY.
(Signed) LUCIUS W. CONKEY.

All of the other judgment notes referred to in the record are precisely the same in form.

The notice of the dissolution of the limited partnership, with proof of publication thereof, appears upon pages 918 and 919 of the Graves record, and read as follows:

"EXHIBIT 2," CONKEY.

I, Myra Bradwell, president of the Chicago Legal News Company, do hereby certify that a notice signed Benj. B. Fay and Lucius W. Conkey, of which the annexed printed slip is a true copy, was published for six successive weeks, to wit: six times in the Chicago Legal News, a weekly secular newspaper published every Saturday in the city of Chicago, county of Cook, and State of Illinois, of general circulation throughout said county and State, and specially authorized by law to publish legal notices in said city and county, and that the date of the first paper containing the same was the second day of December, A. D. 1882, and that the date of the last paper containing the same was the sixth day of January, A. D. 1883.

In witness whereof, the president of said Chicago Legal News Company has hereunto affixed the seal of said company, and subscribed her name, at the city of Chicago, this 6th day of January, A. D. 1883.

MYRA BRADWELL,
President.

(Copy of Printed Slip.)

BONNEY, FAY & GRIGGS,
Attorneys, 156 Washington St.

Notice of dissolution of limited partnership.—Notice is hereby given, that the limited partnership formed under the laws of the State of Illinois, the thirtieth day of March, A. D. 1882, by and between William A. Boies, a resident of Evanston; Benjamin B. Fay, a resident of Chicago, and Lucius W. Conkey, a resident of Evanston, all in the State of Illinois, as general partners, and Julius K. Graves, a resident of Dubuque, in the State of Iowa, as special partner, for conducting and prosecuting the business of wholesale grocers and importers, under the firm name and style of Boies, Fay & Conkey, and which limited partnership by its terms was to terminate on the thirtieth day of March, A. D. 1887, is terminated and ended by mutual consent from and after the date hereof.

Witness our hands at Chicago, Illinois, this seventeenth day of October, A. D. 1882.

WILLIAM A. BOIES.
BENJAMIN B. FAY.
LUCIUS W. CONKEY.
JULIUS K. GRAVES.

BONNEY, FAY & GRIGGS,
Attorneys.

The above-named business will be continued by Benjamin B. Fay and Lucius W. Conkey, under the firm name and style of Fay & Conkey.

BENJ. B. FAY.
LUCIUS W. CONKEY.

The dissolution of limited partnership was duly acknowledged and recorded with the clerk of the County Court of Cook County on the second day of December, 1882, as appears from the certificate of said clerk annexed to said certificate of dissolution, at pages 795 and 796 of the Graves record. Said certificates of dissolution and acknowledgment are as follows:

DISSOLUTION OF LIMITED PARTNERSHIP.

This certifies that the limited partnership formed under the laws of the State of Illinois, on the thirtieth day of March, A. D. 1882, by and between William A. Boies, a resident of Evanston; Benjamin B. Fay, a resident of Chicago; and Lucius W. Conkey, a resident of Evanston, all in the State of Illinois, as general partners, and Julius K. Graves, a resident of Dubuque, in the State of Iowa, as special partner, for conducting and prosecuting the business of wholesale grocers and importers, under the firm and style of Boies, Fay & Conkey, and which limited partnership, by its terms, was to terminate on the thirtieth day of March, A. D. 1887, is terminated and ended by mutual consent from and after the date hereof.

Witness our hands and seals at Chicago, Illinois, this seventeenth day of October, A. D. 1882.

WILLIAM A. BOIES. [Seal.]
BENJAMIN B. FAY. [Seal.]
LUCIUS W. CONKEY. [Seal.]
JULIUS K. GRAVES. [Seal.]

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

I, J. Edwards Fay, a notary public in and for said county, in the State aforesaid, do hereby certify that William A. Boies, Benjamin B. Fay, Lucius W. Conkey, and Julius K. Graves, who are personally known to me to be the same persons whose names are subscribed to the foregoing certificate, appeared before me this day in person and severally acknowledged that they signed, sealed, and delivered the said certificate as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this seventeenth (17th) day of October, A. D., 1882.

J. EDWARDS FAY,
Notary Public.

[Seal.]

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, M. W. Ryan, clerk of the County Court of Cook County, in the State aforesaid, do hereby certify that the foregoing is a true and correct copy of certificate of dissolution of partnership of Boies, Fay & Conkey, filed December 2, 1882, all of which appears from the records and files of my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said County Court at my office, in the city of Chicago, in said county, this 17th day of September, A. D. 1883.

M. W. RYAN,
Clerk of the County Court.

(Endorsed:) Filed this 2d day of December, 1882. E. F. C. Klokke, County Clerk. Recorded book 40, page 283. J. Edwards Fay, Atty.

The notice of dissolution, subsequently entered into between the three general partners, is marked "Exhibit I," to the testimony of C. H. Remy, and appears upon page 816 of the Graves record, and is in the words and figures following, to wit:

"It is hereby stipulated and agreed by and between the parties hereto that the partnership heretofore existing between William A. Boies, Benjamin B. Fay and Lucius W. Conkey, under the firm name of Boies, Fay & Conkey, is this day dissolved by mutual consent. The said dissolution shall date from the first day of November, 1882, and legal notice thereof be published on or before the tenth day of November, 1882.

Witness our hands and seals this nineteenth day of October, A. D., 1882.

(Signed) WILLIAM A. BOIES,
BENJAMIN B. FAY,
LUCIUS W. CONKEY."

On the same day Boies executed a bill of sale to Fay & Conkey, which is marked "Exhibit 1, Conkey," and appears upon pages 916 and 917 of the Graves record, and is in the words and figures following, to wit:

BILL OF SALE.

Know all men by these presents, that I, William A. Boies, of the village of Evanston, in the county of Cook and State of Illinois, party of the first part, for and in consideration of the sum of fifty-five hundred dollars, lawful money of the United States of America, to him in hand paid, at or before the unsealing and delivery of these presents, by Benjamin B. Fay and Lucius W. Conkey, of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and delivered, and by these presents do grant, bargain, sell, and

deliver unto the said party of the second part all the following goods, chattels, and property, to wit: All of my right, title and interest in and to all the assets, of every name and nature, wherever located, of the firm of Boies, Fay & Conkey; and said Benjamin B. Fay and Lucius W. Conkey, as a further consideration of said transfer, assume and agree to pay all the liabilities of the said firm of Boies, Fay & Conkey.

To have and to hold the said goods, chattels and property unto the said party of the second part, his heirs, executors, administrators and assigns, to and for.....own proper use and behoof forever.

And the said party of the first part does vouch to be the true and lawful owner of the said goods, chattels and property, and have in him full power, good right and lawful authority to dispose of the said goods, chattels and property in manner as aforesaid; and I do, for myself and my heirs, executors and administrators, covenant and agree, to and with the said party of the second part, to warrant and defend the said goods, chattels and property to the said parties of the second part, their executors, administrators and assigns, against the lawful claims and demands of all and every person and persons whomsoever.

In witness whereof, I have hereunto set my hand and seal the 19th of October, in the year one thousand eight hundred and eighty-two.

WILLIAM A. BOIES. [Seal.]

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

I, Curtis H. Remy, a notary public in and for said county, do hereby certify that this instrument was duly acknowledged before me by the above-named William A. Boies, this nineteenth day of October, A. D. 1882.

CURTIS H. REMY,
Notary Public.

On the same day Fay & Conkey executed and delivered to Boies the following agreement (see Graves' record, p. 272):

"In consideration of the sale this day made by William A. Boies of his interest in the firm of Boies, Fay & Conkey to us, and the further consideration of one dollar to us in hand paid, we hereby assume and agree to pay all the outstanding indebtedness of the firm of Boies, Fay & Conkey of every name and nature, now contracted or to be contracted by us or either of us in the said firm name, now or hereafter; and we jointly and severally contract and agree to hold said William A. Boies harmless from any liability on account thereof.

"Witness our hands and seals this 19th day of October, 1882.

"BENJAMIN B. FAY. [Seal.]
"LUCIUS W. CONKEY. [Seal.]"

The dissolution of copartnership was also published over the signatures of the three general partners, com-

mencing on Saturday, December 2d. This notice appears as "Exhibit A" to the deposition of Boies, page 269 of the Graves record, and is in the words and figures following, to wit:

"EXHIBIT A," BOIES.

Evening Journal,
Saturday, December 2, 1882.
Dissolution of Partnership.

The copartnership heretofore existing by and between William A. Boies, Benjamin B. Fay and Lucius Conkey, under the firm name of and style of Boies, Fay & Conkey, is dissolved by mutual consent from this date. Mr. William A. Boies retires from the said firm. All accounts and demands against said firm will be settled by Messrs. Fay & Conkey. They will also collect all claims and demands due and owing the said firm, and are alone authorized to receive the same and sign the firm name in receipt and liquidation thereof.

CHICAGO, October 19, 1882.

WILLIAM A. BOIES.
BENJAMIN B. FAY.
LUCIUS W. CONKEY.

The business of the late firm of Boies, Fay & Conkey as wholesale grocers and importers will be continued and carried on at Nos. 113 and 115 South Water street and Nos. 2 and 4 Dearborn street, Chicago, by Benjamin B. Fay and Lucius W. Conkey, under the firm name and style of Fay & Conkey.

CHICAGO, October 19th, 1882.

BENJAMIN B. FAY.
LUCIUS W. CONKEY.

On the second day of December, 1882, being the date of the publications of the notices of dissolution, Fay & Conkey issued a postal card, which was introduced in evidence by the complainant, and is marked "Exhibit A to deposition of Olin," page 544 of the Graves' record, and also a card which was used subsequently to December 2d, which appears on page 545 of said record. The postal card and business card are as follows:

"EXHIBIT A," OLIN.

Fay & Conkey, Wholesale Grocers and Importers, 113 and 115 South Water Street, 2-4 Dearborn Street.

CHICAGO, December 2, 1882.

GENTLEMEN — The wholesale grocery house of Boies, Fay & Conkey being dissolved by mutual consent, the undersigned will continue the business at the same location. Our store is one of the most accessible in the city being in close proximity to the leading hotels, and in the midst of the largest commission houses. We have increased our facilities in very many respects, and know that we are now in every way prepared to fill all orders in a satisfactory manner. We guarantee that no house in Chicago can ship and bill more promptly, or will labor more diligently to merit the patronage which we are now soliciting from you.

We are deeply indebted to the many friends who dealt so liberally with Boies, Fay & Conkey during the past ten years, and sincerely hope they will extend the same feeling of friendship to the new firm.

Truly yours,

FAY & CONKEY.

"EXHIBIT B," OLIN.

Benjamin B. Fay.
J. K. Graves, Special.
William A. Boies. Lucius W. Conkey.
Fay & Conkey, Successors to Boies, Fay & Conkey, Wholesale Grocers and Importers, 113 & 115 South Water St., 2-4 Dearborn St. Chicago.

The words, "Fay & Conkey, successors to," appear, from the testimony of the witness Olin, to have been stamped upon the cards of the old firm in red ink.

"Exhibit 5" to the deposition of Conkey, page 922 of the Graves record, shows upon what form of letter-heads the correspondence of the firm of Fay & Conkey was carried on after the dissolution. Said exhibit is as follows:

"EXHIBIT 5," CONKEY.

William A. Boies. Benjamin B. Fay. Lucius W. Conkey.
J. K. Graves, Special.
Fay & Conkey, Successors to
Boies, Fay & Conkey, Wholesale Grocers and Importers.
113-115 South Water St.
2-4 Dearborn St.

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It appears from the testimony of this witness that the words "Fay & Conkey, successors to," were stamped in red ink on these letter-heads.

At some time prior to the failure, probably about the time that the six weeks publication became complete, new blanks were obtained for bill-heads and letter-heads, which are shown by "Exhibits 3 and 4" to the deposition of Conkey, on page 921 of the Graves record, and they are as follows:

"EXHIBIT 3," CONKEY.

113 & 115 So. Water St., 2-4 Dearborn street.

CHICAGO, ..., 1883.

.....

In acc't with Fay & Conkey.

"EXHIBIT 4," CONKEY.

Benjamin B. Fay. Lucius W. Conkey.

Fay & Conkey, Wholesale Grocers and Importers.

113-115 South Water St.,

2-4 Dearborn St.

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In addition to the documentary evidence of dissolution, the complainant himself put upon the stand eight or ten of the prominent merchandise creditors, or their agents, who testified that they had actual knowledge of the dissolution either before or shortly after the first publication of notice thereof, and that they had sold goods to Fay & Conkey as its successors.

Fay, Conkey and Graves, who were all called as witnesses by the complainant, also give the names of other creditors who had actual notice of the dissolution of and dealt with the firm of Fay & Conkey. Certainly all creditors who received the notes of Fay & Conkey were chargeable with such notice, and nearly all the borrowed money indebtedness was evidenced by such notes. In

fact, largely more than one-half of the indebtedness existing at the time of the failure, was the indebtedness of Fay & Conkey.

The total indebtedness of Boies, Fay & Conkey, as shown by the record, did not exceed, at that time, $125,000, and this included a considerable amount contracted by Fay & Conkey, some of the creditors holding claims against both, and preferring to regard them as an entire liability against the limited partnership.

There is nothing in the record to show that the dissolution was not made in the utmost good faith, or to contradict the testimony of the witnesses having knowledge of the facts and the intent, except a large number of bills, statements and letters, which were made or sent out upon the old printed stationery of the limited partnership, and a large number of small bills received from various dealers, made out against Boies, Fay & Conkey, between the commencement and the completion of the publication of the notice of the dissolution of the limited partnership.

STATEMENT OF ERRORS.

Errors have been assigned in the record by the First National Bank, as follows:

1. The Circuit Court erred in the entry of an order overruling the demurrer of the First National Bank to the bill of complainant and the plea of the defendants, Boies and others.

2. The Circuit Court erred in its finding that the limited partnership of Boies, Fay & Conkey was insolvent August 20, 1882, and so continued to the termination of its business, January 22, 1883, to the knowledge of each of the members thereof.

3. The Circuit Court erred in its finding, that the acts and proceedings of said firm and the members thereof, whereby they pretended to dissolve said limited partnership, were had and done with intent to defeat and evade the provisions of the Illinois statutes of limited partnership; that such acts and proceedings were void, and that said limited partnership was still subsisting at the time judgments were confessed by Fay & Conkey.

4. The Circuit Court erred in its finding that the said judgments were confessed in the main for the purpose of preferring certain creditors of said limited partnership.

5. That the Circuit Court erred in its finding so far as the same related to the judgment confessed in favor of said First National Bank; that Graves and Fay caused execution to be issued thereon, and levied upon the stock in trade and merchandise of said limited partnership.

6. That the court erred in its finding that the sheriff paid to the First National Bank of Chicago upon its judgments, forty thousand dollars.

7. That the court erred in its finding that the law firm of Flower, Remy & Gregory received, as attorneys' fees, out of the assets of said insolvent limited partnership, the sum of $8,559.80, or any other sum.

8. The said Circuit Court erred in decreeing that all the property and effects held by the limited partnership of Boies, Fay & Conkey on the 20th day of August, 1882, and subsequent thereto, and when the said judgments were confessed, were a special trust fund for the payment of the firm's debts ratably among its creditors.

9. The court erred in the entry of its decree of November 17, 1885, in favor of complainant, instead of dismissing the bill at his costs.

10. The Circuit Court erred in its finding (as shown in its decree of April 23, 1888), that the First National Bank received the sum of $38,708.35 out of the sale by the sheriff of the assets of the limited partnership.

11. The Circuit Court erred in its finding, that at the time of the pretended dissolution of the limited partnership in October, 1882, and on the second day of December, 1882, and later, the said bank knew said limited partnership was insolvent and unable to pay all its creditors.

12. The Circuit Court erred in its finding that the contract of dissolution of the limited partnership of Boies, Fay & Conkey was a pretended one and entered into for the purpose of protecting the limited partner, Julius W. Graves, from liability as such and as indorser for the firm, and that the bank co-operated with the members of the limited partnership for the accomplishment of such purpose.

13. The Circuit Court erred in its finding that, for the purpose of protecting said Graves and to obtain an illegal preference over other creditors, the judgment was confessed by Fay & Conkey in favor of said bank.

14. The Circuit Court erred in entering a decree against the said First National Bank directing the payment by it within thirty days, to R. R. Jenkins, receiver, of the sum of $50,721.95.

15. The Circuit Court erred in admitting incompetent evidence upon complainant's behalf as against the appellant, the First National Bank, and especially evidence in relation to the manner of conducting business by Fay & Conkey after the dissolution of the limited partnership.

16. The findings of the court were against the evidence and the weight of evidence.

17. The court erred in the admission of incompetent

evidence for the complainant, and in overruling the objections thereto of the defendant and appellant, The First National Bank, and in the rejection of evidence offered on behalf of the said appellant, and sustaining complainant's objection thereto.

18. The court erred in all of its findings, and each of them.

Brief and Argument.

Upon the record and the errors assigned, we submit the following propositions of law and fact for the consideration of the court:

1. The limited partnership of Boies, Fay & Conkey was lawfully dissolved, and its assets transferred to Fay & Conkey, as successors, and at the time judgments were confessed such limited partnership had no legal existence and no assets. These confessions, therefore, were not affected by the limited partnership act of Illinois.

2. A bill in equity will not lie under the circumstances of this case in behalf of a simple contract creditor. Judgment must first be recovered and execution issued and returned unsatisfied.

3. The National Bank, as a creditor of Fay & Conkey is not affected by any secret agreement or understanding, if any such existed, between the members of the limited partnership, unless it be shown that it had actual or constructive notice of such agreement before extending credit to said Fay & Conkey.

4. The decrees entered in this suit are erroneous and inequitable.

5. The Circuit Court had no jurisdiction whatever to render a decree in this case, for the reason that four of the

necessary defendants therein were and are citizens of the same State as the complainant.

6. The transfers made by Fay & Conkey cannot be held to be a constructive general assignment within the rule laid down by this court in *White* v. *Cotzhausen*.

I.

DISSOLUTION OF THE LIMITED PARTNERSHIP.

1. Express provision is made by the statutes of this State for the dissolution of a limited partnership.

Section 12 of chapter 84 of the Revised Statutes of Illinois, reads as follows:

"No dissolution of a limited partnership shall take place except by operation of law, before the time specified in the certificate before mentioned, *unless a notice of such dissolution shall be recorded in the registry in which such certificate was recorded, and in every other registry where a copy of such certificate was recorded, and unless such notice shall also be published six weeks successively, in some newspaper printed in the county where the certificate of the formation of such partnership was recorded;* and if no newspaper shall, at the time of such dissolution, be printed in such county, then the said notice of such dissolution shall be published in some newspaper printed in an adjoining county."

This section clearly recognizes and establishes the right of a limited partnership, upon complying with the provisions thereof, to dissolve at any time, and under any circumstances, where it would be proper or legal for a general partnership to do so. All of its provisions were strictly complied with by the members of the firm of Boies, Fay & Conkey.

It appears from the record that on the 17th day of October, 1882, the three general partners and the special partner, Julius K. Graves, entered into an agreement of dissolution, and on the same day duly acknowledged the execution of the same, which said agreement of dissolution was on the second day of December, 1882, duly filed in the office of the clerk of the County Court of

Cook County, and the publication of a notice thereof commenced in the Chicago Legal News, and continued weekly for six weeks as required by statute, the publication being complete on the 13th day of January, 1882. (See *supra*, pp. 34 of this brief.)

The statutory dissolution of Boies, Fay & Conkey was supplemented by a further agreement between the general partners made on the 19th day of October, 1882; notice of which was published in the Chicago Evening Journal, commencing on the 2d day of December, A. D. 1882. Each of these published notices had annexed thereto a notice that the business of the late firm of Boies, Fay & Conkey would be continued by Benjamin B. Fay and Lucius W. Conkey, under the firm name and style of Fay & Conkey, which were signed by the individual names of said Fay & Conkey.

William A. Boies, the general partner, who retired from said firm, also executed on the said 19th day of October, a bill of sale transferring to Benjamin B. Fay and Lucius W. Conkey, all of his interests in the assets of Boies, Fay & Conkey, in consideration of $5,500 to him paid, and the assumption by them of all the liabilities of the limited partnership. The dissolution agreements were to take effect on the first day of November, 1882, and it was provided that the first publication of such dissolution should be made on or before the 10th day of November, 1882. (See *supra*, pp. 36 of this brief.)

For various reasons, but chiefly because Fay & Conkey desired to retire as much of the indebtedness of Boies, Fay & Conkey, as possible, the publications were not commenced until December 2d. (*Record, p. 972.*)

In addition to the published notices aforesaid, it appears from the record that on the 2d of December, 1882,

Fay & Conkey issued a postal card announcing the dissolution of said firm, and publishing the fact that Fay & Conkey would continue the business, and that they also stamped upon the face of the business cards of Boies, Fay & Conkey, the words "Fay & Conkey, successors to." This proof is made by the testimony of Edwin E. Olin, a witness called by the complainant. Lucius W. Conkey testifies to precisely the same state of facts as to the use of the old letter-heads of Boies, Fay & Conkey, with a like stamp of "Fay & Conkey, successors to" upon it; also to the subsequent issue of a new bill and letter-head in the name of Fay & Conkey. (See *supra*, pp. 39 for forms.)

Actual notice was also given to many of the creditors of Boies, Fay & Conkey, as shown by the testimony of witnesses called in behalf of the *complainant*.

John W. Adams testifies that the firm of J. W. Doane & Co., of which he was a member, knew of the dissolution between the 5th and 15th of December, and sold goods to Fay & Conkey thereafter. (*Record, pp. 622, 623.*)

J. L. Dobbs, Western agent of Arbuckle Bros., knew of the change on the evening of December 5th, and sold goods to the firm of Fay & Conkey thereafter. (*Record, pp. 620, 621.*)

Mr. Holcroft, agent of the Catlin Tobacco Company, was advised by Fay on the 28th of November that there would be a new firm on the first of December. (*Record, p. 618.*)

Samuel Faulkner was advised on the 24th of November by Mr. Fay that on the first of December he was to buy out Mr. Boies' interest, and also that he saw the notice of dissolution in the Chicago Evening Journal.

Mr. Frederick C. Hanford, a clerk for P. C. Hanford & Co., testified that he sold goods to the firm of Fay & Conkey after the second of December, and that he may have seen their card, "Fay & Conkey." Their only claim was against Fay & Conkey, all bills against Boies, Fay & Conkey having been paid. (*Record, p. 612.*)

B. F. Morse, agent for the Royal Baking Powder Company, testified that he had notice of the dissolution as early as the 6th of December, and had subsequent dealings with the firm, and delivered goods to them. (*Record, pp. 598 and 599.*)

S. B. Raymond, agent for a large number of sugar refineries and glucose factories, knew of the change about the time Boies went out, and also as to Graves (*Record, p. 632*), sold goods to the new firm of Fay & Conkey (*Record, p. 641*). These are all witnesses introduced by complainant.

Mr. Conkey, one of the firm, testifies on this subject of notice, that M. E. Page, a creditor, knew when the firm dissolved and when Mr. Boies went out; that Faulkner & Stearn knew of such dissolution within a day or two after the dissolution was published; that Hutchins, another creditor, knew of it a day or two after, and that he personally advised him of the fact that he and Fay had succeeded to the business. N. K. Fairbank & Co., Mann Bros., Morrison, Plummer & Co., Steel & Price and Metzler, Rothschild & Co. also knew when the firm dissolved. (*Pp. 959 and 960 of Record.*)

Mr. Fay testifies that J. W. Doane & Co. knew at the time of the publication of the dissolution, or a day or two after, of the fact that Fay & Conkey had succeeded Boies, Fay & Conkey, also J. K. Armsby & Co., Bever-

idge & Dewey, the First National Bank, and the sugar refineries of which the firm bought goods.

It follows, of course, that all parties who had received Fay & Conkey's notes — and such notes represented by far the greater part of their indebtedness — were likewise chargeable with the notice of dissolution.

It would seem as though the publication and notice were ample and complete so as to bring to the knowledge of all parties having had dealings with the limited partnership of Boies, Fay & Conkey, that Benjamin B. Fay and Lucius W. Conkey, under the name of Fay & Conkey, had succeeded to the business.

Among the allegations of the complainant's bill, it is charged that the dissolution was made for the purpose of enabling Fay & Conkey, as successors, to prefer certain creditors of the limited partnership, and to enable Graves to withdraw his special capital from the business. The acts of the parties, which were gone into largely, fail to establish any foundation for such a charge. At the time of the dissolution, Graves had invested a special capital of $50,000, and was liable, as indorser, upon some eighteen or twenty thousand dollars of the paper of the limited partnership, making an aggregate of about $70,000. At the time of the failure, Graves still had in the concern substantially about fifty thousand dollars, and was liable upon the paper of Fay & Conkey to the extent of at least seventy thousand dollars—he says $85,000. A decree was rendered against him in this proceeding for $100,000, making his losses (if he were able to pay the judgment), including his investment as a special, $150,000, or $80,000 more than the amount he had at risk when the limited partnership was dissolved. There would seem to be nothing in this to indicate any intent to relieve

Mr. Graves of any of his liability, or to restore to him any portion of his special capital. Moreover, the proof is that Graves sold his interest in the business to Fay, and took his note for $50,000, at five years, indorsed by Fay & Conkey. It is hardly supposable that Graves would have done this if it were the intent of the parties at the time of dissolution to protect him, so as to enable him to withdraw his special capital. It should also be borne in mind, that at the time of failure, no effort was made to secure him against this loss. (*Graves' Record, pp. 379 and 1,049.*)

The statement of the individual account of J. K. Graves from the books of Boies, Fay & Conkey, shown upon pages 162 and 163 of the record, and put in evidence by the complainant, would seem to indicate that Graves' balance to his credit had been reduced to $19,067.28. There are two items, however, under date of March 16th and March 27th, which were made two months after the books had passed into the hands of a receiver, amounting in the aggregate to $27,232.56. These are amounts paid by the receiver upon the judgment in the United States Court in favor of Graves, which had been assigned to the First National Bank as collateral security for paper of Fay & Conkey, and indorsed by Graves, which it held. This is not a proper charge to be made against his capital account, and the payment was not made on account of the same. If deducted, it would leave the credit balance in his favor, $46,297.28, as special capital at the time of the failure. That these charges were improper is shown by the testimony of Vaughan. (*Record, pp. 434, 435.*) That $27,000 of this amount was paid to the bank in discharge of

Fay & Conkey's indebtedness to that extent appears from Gage's exhibit of payments. (*Record, p. 1,072.*)

From the time that Graves went out of the business up to the time of the failure, in addition to the indorsements made by him, he was continually used by the firm, both before and after the 2d of December, for the purpose of obtaining money from Dubuque banks. Drafts were made upon him and post-dated checks forwarded to him, upon which to raise money to pay the drafts. It so happened that in that way, when the bank account was changed from Boies, Fay & Conkey to Fay & Conkey, there were outstanding checks of Boies, Fay & Conkey drawn prior to the 2d and dated ahead, then held by the Dubuque banks and subsequently paid by Fay & Conkey. The same state of facts existed at the time of the failure, —certain unmatured checks of Fay & Conkey being held by the Dubuque banks, bearing date subsequent to the failure, which were included in the judgments confessed in favor of said banks. (See *pp. 373, 972, 973, 1,039, and 1,067 of Record.*)

Another evidence of the good faith of the dissolution aside from the use made of their friend and former partner, is the fact that Fay & Conkey largely increased their loans with the banks for the purpose of raising money to meet the maturing indebtedness of the limited partnership. In this way they obtained from the First National Bank an increase upon their loans to the extent of $30,000, $5,000 of which was upon their own paper, without security or indorsement. This is clearly shown by the two statements prepared and put in evidence by L. J. Gage, the vice president of that bank. (See *Record, pp. 739, and 1071.*)

Up to this point there would seem to be nothing what-

ever to throw any doubt or distrust upon the good faith of the parties to the dissolution. The principal facts relied upon by the complainant to show bad faith are claimed to be chiefly shown by a large number of exhibits, consisting of bills of purchase and sale in the name of Boies, Fay & Conkey, after the publication of the notice of dissolution. These are identified largely by Conkey, and are to be found on pages 926 to 956 inclusive; also by Fay, on pages 989 to 993 inclusive; and John F. Kistner, pages 1,113 to 1,124. Stress is also laid upon sundry receipts in the express receipt books, where the name of Boies, Fay & Conkey was printed on the blank. The bills referred to, and made exhibits, are usually very small, and what are known as street bills, and range in date from December 2d down to some time about the 13th of January. It is not apparent how this can in any manner affect the situation or the rights of creditors dealing with Fay & Conkey, or overcome the reasonable presumption arising from the notices given, and their efforts to meet and take care of the paper of Boies, Fay & Conkey as it matured, that they were acting in good faith.

The direct testimony on the subject comes entirely from the four partners, who alone are supposed to know the facts, as well as the real object and intention of the parties in making the dissolution.

Boies, the senior member of the firm, testifies that, at the time of the dissolution, he took notes for fifty-five hundred dollars for his interest, without security; that he considered them good; that he had nothing to do with the management of the business thereafter; that he withdrew no money from the concern, and had been paid nothing on his notes; that he did not contemplate, at the time, that the firm was to become bankrupt or insolvent,

nor did he consent to the dissolution for the purpose of placing the assets in the possession of Fay & Conkey, so that they might make preferences or create liens. He first knew of the insolvency on the 22d day of January, 1883. He saw nothing prior to that time that indicated insolvency, although he was in the store several times; that in August the firm had a surplus of $50,000. (See *pp. 878 and 879 of Record.*)

Fay testifies that August 1, 1882, there was a surplus in the business of $50,000, as shown by the books; that at the time of the dissolution no member of the firm contemplated bankruptcy or insolvency, nor did they intend to execute judgment notes to creditors to give a preference, or contemplate doing so, or the giving of any liens upon the property of the firm. He did not know that the firm was insolvent at the time of dissolution; Graves was on the paper of the firm at that time; his liability was larger in that direction in January than in October. At the time of the dissolution, Fay & Conkey assumed all liabilities, and gave Graves a note for his interest, $50,000, which was to remain as long as they wanted it; that goods after the 2d of December were bought in the name of Fay & Conkey, and none bought in the name of Boies, Fay & Conkey. Bills of Boies, Fay & Conkey, maturing thereafter, were paid by notes or acceptances of Fay & Conkey, or in cash. The notes after the 2d of December were paid in Fay & Conkey's checks All paper discounted was Fay & Conkey's. Cannot tell how much there was of Boies, Fay & Conkey's paper outstanding at the time of suspension. The total indebtedness was about three hundred or three hundred and fifty thousand dollars. The cause of suspension was the refusal of Mr. Graves to indorse further, and the dull business and cold

weather. Did not know they would have to suspend until after 1 p. m. on the 20th of January. (See *pp. 964, 965 and 966 of Record.*)

Conkey testifies that neither at the time of dissolution of the limited partnership nor at any time prior to the suspension on the 20th of January, 1883, did he contemplate giving any security to the creditors of Boies, Fay & Conkey to give them a preference over any other creditors; that an inventory was taken of the business about the 1st of August, showing a surplus of about $50,000; did not know that the firm of Fay & Conkey was obliged to suspend until about the 20th of January, at two o'clock in the afternoon. One reason for the suspension was that the line of discount at the bank was full, and another that Graves refused to indorse its paper. After December, 1882, the business was conducted in the name of Fay & Conkey and goods purchased in their name. No goods were purchased thereafter under his orders or by his direction in the name of Boies, Fay & Conkey, nor did he execute any paper in that name, nor did any one else with his knowledge. The notes of Fay & Conkey were given in payment for bills of merchandise bought in the name of Boies, Fay & Conkey. Graves became liable after the 2d of December by indorsing the paper of Fay & Conkey. The First National Bank, Beveridge & Dewey, The Importers & Traders Bank, and one or two banks in Dubuque held that paper. Graves assisted us in other ways. We used to draw sight drafts on him at Dubuque, and sent our checks dated ahead to take them up with. Graves' liability as indorser increased very materially after the 17th of October and before the 20th of January.

Graves, being called and examined as a witness on behalf of the complainant, testified (see *p. 362, Record*),

that, during the week preceding the 22d of January, 1883, he was in the city of Chicago and indorsed a good deal of paper for Mr. Fay during that time; that Fay called Monday at the Grand Pacific and desired witness to indorse seven thousand dollars, which he did. Called again Tuesday and showed him a dispatch from New York, saying he could have money on his indorsement, and asked him to indorse five thousand dollars on that day, which he did. Called Friday afternoon and asked him to indorse seventy-five hundred dollars of paper, which he did. Called Saturday morning and asked an indorsement of fifteen thousand dollars of paper. Witness says:

"I at once asked that the cashier of the concern come to the hotel. I then declined to indorse that paper.

Q.—"That is, Saturday, the 20th of January, 1883?

A.—"Yes, sir.

Q.—"Why did you send for the cashier to come to the Grand Pacific Hotel?

A.—"Mr. Fay had told me that the indorsement that I had already given him during that week covered his necessities for the month. I was surprised when on Saturday he asked me to indorse fifteen thousand dollars more. I sent for Mr. Vaughn, and asked him to tell me what the liabilities of the firm were. It was his statement.

Q.—"Did he inform you of the amount of the liabilities?

A.—"Yes, sir.

Q.—"What were they at that time, according to his statement?

A.—"I think they were at least one hundred thousand dollars more than I had been told by the firm they were.

Q.—"Please give the amount in gross?

A.—"I wouldn't undertake to give the amount in gross. My recollection is that the statement that I had from the firm, was that they owed less than three hundred thousand dollars, but that Mr. Vaughn's figures showed about four hundred thousand dollars.

Q.—"And in consequence of this large amount of indebtedness, you declined further to indorse the paper, did you?

A.—"Up to that moment—

Q.—"Please answer.

A.—"I am going to in my own way. Up to that moment I believed the firm was sound and solvent and the members of that firm as honorable and upright as any in the city of Chicago. Mr. Vaughn's statement to me upon his honor was a greater surprise to me than any surprise that I have ever had in my life.

Q.—"But after being so advised by Mr. Vaughn, you then declined to indorse any more paper, did you?

A.—"I told Mr. Fay then and there, that up to that time, I had believed, from the statement made, that I was perfectly safe in indorsing, but the discrepancies shown by Mr. Vaughn ended the matter so far as I was concerned, and I would not be a party in any way, shape or manner in connecting my name with them.

Q.—"What time was that on Saturday, Mr. Graves, as near as you can remember?

A.—"I can't give the exact time. I think past one o'clock.

Q.—"On Saturday, January 20th, 1883?

A.—"Yes, sir."

Graves further testifies (*Record, pp. 1,032, 1,034, 1,035*), that at the time of the organization of the limited partnership, Mr. Fay stated that the capital unimpaired amounted to $102,000; that he did not himself examine the assets or the books; that he had nothing to do with the August inventory, and had no recollection about it; that he entered into the agreement of dissolution of October 17th in good faith, taking the note of Fay for $50,000 at five years, indorsed by Fay & Conkey, and leaving his money in the business. (*Record, p. 379.*) At the time of the dissolution nothing was said about the insolvency of the firm of Boies, Fay & Conkey.

"I did not as a former member of that firm or as a special partner contemplate, nor did any member of that firm, so far as I know, at the time of dissolution, contemplate insolvency or bankruptcy, most emphatically; nor did any of us contemplate confessing a jndgment for the purpose of giving priority. I first learned that the firm of Fay & Conkey would have to suspend on the 20th of January."

Witness further says that he told Fay on that day as follows:

"That I believed every statement that he had made; that I had indorsed every piece of paper he had asked me to; that I would now stop, and feel that I had been most infamously deceived. I had from the time of my retirement paid their drafts when I was not a partner. I had paid their drafts for over $60,000, drawn without notice, except a day's notice on draft, and I had indorsed fully as much paper, showing my implicit confidence in the stability and integrity of the firm and its partners. On the 20th of January, 1883, I think I was liable

on paper of Fay & Conkey, to about $85,000. At the time of the dissolution I think I was on Boies, Fay & Conkey's paper, aside from my special capital, to the amount of fifteen or twenty thousand dollars."

Vaughn testifies (*Record, pp. 886, 887, 895, and 896*) that he was head bookkeeper for the firm of Boies, Fay & Conkey and Fay and Conkey during 1882, and up to the time of the failure; that Fay & Conkey purchased about $80,000 worth of goods after December 2d, which existed in open account; that the amount of their sales after December 2d, 1882, was from $115,000 to $120,000; that about $100,000 worth of goods were received and put in stock after December 2d. Some of the goods purchased by Fay & Conkey were evidenced by their notes, and did not exist in open account. The aggregate indebtedness of Boies, Fay & Conkey December 2d, as nearly as the witness could remember, was about $400,000. About three-fourths of it, or $300,000 was retired between December 2d, 1882, and the time of the failure. Some of it was paid in cash and some in notes of Fay & Conkey. At the time of the failure the total indebtedness of Boies, Fay & Conkey was about $100,000. Letters written to creditors of Boies, Fay & Conkey after the 2d of December were signed Fay & Conkey. I wrote the letters. I think all acceptances were so signed. None of them were returned on the ground that they were not properly signed. When the paper of Boies, Fay & Conkey matured at the bank, subsequent to the 2d of December, it was taken care of by check on the bank. Money borrowed after that date at the bank was borrowed on Fay & Conkey's notes; some on Fay & Conkey's notes, with Graves' indorsement; none upon Boies, Fay & Conkey's paper after that date. Fay & Conkey borrowed money on the 8th of December, $8,000, and deposited a warehouse receipt as collateral. The money was borrowed for the use of the firm.

Mr. Gage testifies (*pp. 753, 754 of Record*): I know nothing of any scheme entered into by J. K. Graves and Boies, Fay & Conkey, constituting the limited partnership of Boies, Fay & Conkey, to dissolve their firm in contemplation of bankruptcy or insolvency, or for the purpose of enabling them to prefer creditors in violation of the limited partnership act of this State.

Mr. Gage further testifies (*Record, p. 1089*) as follows:

"As I have stated, on Wednesday—I think it was on the week prior to the 22d—I expressed to him (Mr. Graves) my anxiety about the financial condition of Fay & Conkey. He called in again on Thursday, I think, and stated that he had had a long interview with Mr. Fay. He held in his hand what purported to be a statement of payments which would be required by the firm of Fay & Conkey for quite a period of time to come—I think as much as thirty days—and said that Fay had told him that that was all that would be required, and that his receipts would naturally be much in excess of that sum. I examined the statement, and told Mr. Graves, in most forcible language, that the statement was untrue; that he did not include all his payments, and he ought not to rely upon it. He then said that he would get from the bookkeeper of the firm a complete statement, independent of Fay; and the next morning, I think, he dropped in, and said that he had called upon Fay; had told him he wanted him to direct the bookkeeper to give him all the information that he should require as to the accounts receivable and payable of the firm, and he added: 'I expect to have that during the day.' He called in again Saturday, about one o'clock; seemed to be in great trouble and under much agitation, and said he was going immediately up-stairs to the attorneys to secure his claims. Fay had deceived him, and it was useless for the firm to go on any longer. That, I think, covers the interview between Mr. Graves and myself on that subject.

Q.—"Up to Saturday afternoon, had Mr. Graves, in any conversation with you, expressed any doubt as to the solvency of Fay & Conkey?

A.—"Up to that time he had expressed the strongest assurance of belief in their solvency and general financial ability."

All of these witnesses were parties to the suit, and were called by the complainant.

Having offered them as witnesses in proof of his cause, he has thereby represented them to be worthy of belief.

Greenleaf on Evidence, sec. 442.

While we do not understand, that the rule goes so far, that where an adversary is called as a witness, the party who calls him is absolutely bound by his testimony, it certainly must go to this extent, that where he "has "voluntarily put his adversary on the witness stand, he "cannot insist that his testimony should be ignored if it "happen to disappoint him. It is competent testimony in "the case, and unless self-contradictory or inherently im-"probable, it must prevail, in the absence of countervail-"ing evidence."

Dravo v. *Fabel*, 25 F. R. 119.
McLean v. *Clark*, 31 F. R. 505.
Chandler v. *Attica*, 22 F. R. 625.

Is there anything in the testimony of these witnesses that is contradictory or improbable? Is there anything in the record that contradicts their positive statements as to the facts attending the dissolution, or their reasons for making it? The legal presumption is that they acted in good faith and with an honest purpose, and that presumption is supported, as we claim, by the direct testimony of the parties, as well as by their acts and the surrounding circumstances.

We respectfully submit that the dissolution was legal, and that Fay & Conkey as successors were at the time of the failure the lawful owners of the property of the limited partnership, divested of any lien or equity in favor of the creditors thereof.

2. *If the dissolution of the limited partnership was a valid one, the assets passed to Fay & Conkey, divested of any equity or lien in favor of the limited partnership creditors.*

Where parties by *bona-fide* sale or dissolution transfer

all the firm assets, or an interest therein, whether the partnership be a *limited* or general one, to one of their members or to a stranger, such assets cease to be firm assets, even when courts of equity are subsequently called upon to administer the same.

Case v. *Beauregard*, 99 U. S. 125.
Baker's Appeal, 21 Pa. St. 76.
Upson v. *Arnold*, 19 Ga. 190.

In the latter case, the facts were as follows: Arnold and Gresham were general partners; Gresham sold out to Arnold, who assumed the debts of the firm. Arnold then made a limited partnership with Upson as special, and the latter contributed $5,000. Upson, the special, subsequently sold out to Arnold, who assumed the debts. Arnold died insolvent, leaving debts of both firms unpaid. His executrix filed a bill to marshal the assets, and the court below held that, by reason of these sales by Gresham and Upson, the firm assets became individual assets, and, by reason of Arnold's assumption of them and his agreement to indemnify the retiring partners, the firm debts in equity become the individual debts of Arnold, and should share *pro rata* with his other indebtedness. This decision was affirmed by the Supreme Court of Georgia—that court holding substantially that, "upon the dissolution of a "partnership, general or limited, where the retiring part-"ner *bona fide* assigns all his interest in the stock and "effects to the remaining partner, the same becomes "separate property, and will be distributable accordingly, "notwithstanding the subsequent insolvency of the remain-"ing partner."

3. *The fact of the insolvency of the firm at the time*

of such transfer does not render such transfer mala fide, nor does knowledge of such insolvency.

Case v. *Beauregard*, 99 U. S. 125.
Tracey v. *Walker*, 6 Flippin. U. S. 41.
Blow v. *Gage*, 44 Ills. 208.
Howe v. *Lawrence*, 9 Cushing, 558.

In the case of *Blow* v. *Gage*, *supra*, the court holds that it is no evidence that a firm is insolvent, because, if forced to wind up its business at a particular time, it would be unable to pay all its liabilities, and it is no fraud upon the creditors for one of its members to sell out to the other partners, at such a time, his interest in the partnership, and to be so, there must be proof of such fraudulent design.

The court, in its opinion, say (*p. 216*):

"It is, however, said that the firm was insolvent at the time Innis withdrew, and that all of the partners knew the fact that the firm might not then have been able, had it been forced into liquidation, to pay all of its liabilities, may be true. And that the same might be said of a large number of business houses of high standing, and who eventually overcome their inability to pay, and cease to exist with large fortunes, there can be no doubt. Such a state of things is unavoidable, from the very nature of the credit system. If it is a fraud on creditors for a member of a firm to sell out to his partners, because the house would be unable to pay all its debts if forced to wind up its affairs, it is believed that a large number of partnerships could not be dissolved by a member selling out to his partner. We do not regard such a transaction as fraudulent, and to be held so, there should be proof that such is the design. The fraudulent intent is denied in this case, and it is not so clear that they knew the firm would fail as to render it probable that it was designed for fraudulent purposes. On the contrary, it was no more than reasonable to believe that the parties supposed their firm was in a reasonably safe and healthy condition, and that they could soon recover so as to be easy in their circumstances. Their indebtedness was a little more than their assets, which, after the disastrous year they had just passed, was not surprising, and, as the partners deny that any fraud was intended, this fact does not overcome the denial. Again, if the design was to perpetrate fraud in the manner charged, we are at a loss to understand why it was that Innis loaned the firm $5,480, after all of the indebtedness of the former firm had been paid or renewed, and he entirely released therefrom, and this, too, but a short time before the failure occurred. If the object of the parties in making the sale was to get him released, we are unable to comprehend why he should have, after the end had been accomplished,

voluntarily advanced such a sum so short a time before the next step was taken by which it is insisted the preference was to be given to a portion of the creditors.

Again, on page 217, the court say:

"Fraud must be proved, and cannot be established by mere suspicion. And while the law abhors fraud and crime, at the same time it is unwilling to impute either, on slight and trivial evidence, thereby wrongfully destroying the character of men worthy of confidence and respect. Such imputations are grave in their character, and should not be lightly made, and should only be sustained on satisfactory evidence."

The assets of a limited partnership are trust funds in no other sense than are the assets of a general partnership, to wit: When a court of equity is properly appealed to, to administer them, and such application is made before they have ceased to be partnership assets.

Van Alstyne v. *Cook*, 25 N. Y. 494.

This was a limited partnership matter, where the firm and all of the general partners were insolvent.

The Artisans' Bank recovered a judgment against the limited partnership, but before issue of execution, suit was commenced by one of the partners for an equitable distribution of the partnership effects, and praying for a receiver. After the suit was commenced, and before an order was entered appointing such receiver, the bank levied its execution.

It was claimed under the limited partnership law of New York, that

"Whenever a limited partnership becomes insolvent, from that time its assets become trust funds for the benefit of all creditors; and no creditor, *either by superior diligence or by the favor of the partners*, can acquire any valid lien in preference to other creditors."

The court failed to take this view of the case, and in its opinion says (*p. 494*):

"No statute confers equity jurisdiction in such case, and such jurisdiction can only be referred to the general head of equity jurisdiction in cases of part-

nership. Courts of equity have an established jurisdiction in cases of partnership to dissolve the copartnership, to close its affairs and settle all matters involved in the liquidation of its affairs as among the partners themselves, and in respect to their creditors. As incident to the exercise of its control over the partners in compelling them to account and in the adjustment of all equities between them, it appoints a receiver of their assets, when proper, and distributes the assets. If the partnership is insolvent, it makes such distribution upon its favorite rule that equality is equity, and it regards the property of the copartnership as a trust fund for the payment of the partnership debts *pro rata. It is in this sense, and upon this principle, that the assets of a limited partnership are trust funds.* They are trust funds when the courts of equity are properly appealed to in behalf of the partners, or any partner or creditor, to protect and distribute the same upon equitable principles, and on such application assert the control over them. *They are not trust funds in the hands of the partners, any more than ordinary partnership property. There is no rule in equity which makes them trust funds in any other sense, or which gives the court of equity control over them, or which forbids any creditor of the copartnership, or of any individual party from obtaining a lien on them by due process of law in any hostile proceedings.*"

The principle above set forth as to the sale or transfer of partnership assets applies with equal force, *although the direct effect of such application may be to defeat a statutory provision intended to bring about the distribution of firm assets in a certain manner.* This is the exact point decided in the case (which is directly analogous to the one at bar) of *Case* v. *Beauregard, supra.*

4. The provision of the Illinois Statutes, upon which the complainant relies to avoid the liens in favor of the judgment creditors in this suit, is section 22 of chapter 84 of the Revised Statutes, entitled "limited partnerships." This section reads as follows:

"It shall not be lawful for any such partnership, nor any member thereof, *in contemplation of bankruptcy or insolvency*, and with the intention and for the purpose of paying or securing any one or more of their creditors in preference to any other of their creditors, to make any sale, conveyance, gift, transfer or assignment of their property or effects, or to confess any judgment, or to create any lien whatsoever on their property or effects; and every such conveyance, gift, transfer, or assignment, involving such judgment or other lien, shall be, and the same is hereby declared to be utterly void."

This differs essentially from like statutes in relation to limited partnerships in other States.

In most of the States containing such a statute, the provision reads as follows:

"Every sale, assignment or transfer of any of the property or effects of such partnership, *made by such partnership when insolvent, or in contemplation of insolvency, or after or in contemplation of the insolvency of any partner, with the intent,*" etc., "shall be void." (Bates on Lim. Part. 167.)

This is true of the statutes of New York, New Jersey, Pennsylvania, Ohio and Iowa. It would seem that in those States mere insolvency, with or without knowledge thereof, would render any sale, assignment or transfer of limited partnership assets void, if made with intent to prefer, etc. In this State such sale only becomes void in the event that the parties make the sale or transfer in contemplation of insolvency, with the intent and for the purpose of paying or securing one or more of the limited partnership creditors in preference to others.

The important disputed question of fact to be determined in this case, then, is:

Did Boies, Fay & Conkey, in October, when they parted with and transferred their assets to Fay & Conkey, intend that they should continue the business and pay the debts of Boies, Fay & Conkey?

Or,

Did they make such transfer with the intent that Fay & Conkey, after acquiring the legal title to said assets, should fail, and should thereupon execute judgment notes to prefer creditors, and so avoid the prohibition contained in the limited partnership act?

The dissolution being lawful, and the same having been made in strict compliance with the provisions of the limited partnership act, the burden is upon the complain-

ant, and he must show, that it was made for unlawful purposes, with the intent to evade the provisions of the act, and to prefer the creditors of that partnership.

All of the subsequent transactions by which the creditors of Fay & Conkey were preferred must be shown to relate back and to have been contemplated at the time that the dissolution was agreed upon.

We submit that, in his effort to do this, the complainant has signally failed.

II.

A SIMPLE CONTRACT CREDITOR HAS NO STANDING IN A COURT OF EQUITY FOR THE PURPOSE OF ATTACKING TRANSFERS MADE BY HIS DEBTOR UNLESS A TRUST HAS BEEN CREATED FOR HIS BENEFIT, OR HE SHALL HAVE FIRST EXHAUSTED HIS REMEDY AT LAW BY THE RECOVERY OF JUDGMENT AND ISSUE, AND RETURN OF EXECUTION UNSATISFIED.

The bill is filed upon two promissory notes executed by the firm of Boies, Fay & Conkey, October 30, 1882, which notes have never merged in a judgment. As a creditor of the limited partnership, we claim that the complainant, as a simple contract creditor, would have no right and no standing in a court of equity to attack a sale or transfer of the assets of the limited partnership to one or more of its members, for the reason that such transfer is expressly allowed by the provisions of the law upon that subject. *It is not one of the prohibited acts contained in the statute.* Even though such dissolution should be made with a fraudulent intent, the doing of it would not create a trust in his favor which would permit him to go into a court of equity to question the good faith of the transaction until after he had exhausted his remedy at law.

In respect to a dissolution and transfer of assets by a limited partnership to one or more of its members, we apprehend that it stands upon precisely the same footing as a general one (due regard being had to the notice and publication to be given and made), and that the creditor of the limited partnership is in no better position to attack the same than the creditor of a general partnership would be under like circumstances. Surely no one would claim for a moment that a creditor of a general partnership could attack a transfer of that character until he had exhausted his remedy at law and had execution issued and returned unsatisfied.

If our view of the situation be correct, and we have succeeded in establishing the fact that the partnership was legally dissolved, and that complainant has failed to show, as he must, contemplated insolvency, or fraud, in the doing of that act, his situation is substantially as follows:

He expressly disavows that he is a creditor of the firm of Fay & Conkey, and claims and insists that the limited partnership is still in existence, and that he is a creditor of that partnership only.

He does not seek to avail himself in any manner of the obligation assumed by Fay & Conkey as successors, to pay and discharge his and other obligations of the firm of Boies, Fay & Conkey. Such being the case, he has no right to complain of the acts of Fay & Conkey or of the disposition which they have made of their assets.

If they are *bona-fide* purchasers of the assets of Boies, Fay & Conkey, divested of any lien or equity of the creditors of that firm, and if, after having acquired title and possession, they have contracted new debts and liabilities, they would have a right to apply these assets in discharge of such liabilities, and nobody but a creditor of

Fay & Conkey could complain of it, and none of their creditors have done so. It is only as a creditor of Fay & Conkey that the complainant can attack any disposition made by them of their firm assets. They have a right to apply them in discharge of their own obligations to the exclusion of their individual liabilities, and to the exclusion of the liabilities of Boies, Fay & Conkey, if the creditors of that firm do not choose to avail themselves of the obligation entered into by Fay & Conkey for their benefit.

Even though Corbin had accepted the situation and claimed the advantage of the obligations assumed by Fay & Conkey, and desired to assert the same, he could not do so by bill in equity upon the ground that a trust had been created in favor of creditors in which he was entitled to share. He must first exhaust his remedy at law. Unless he has done so he cannot successfully attack judgments confessed by Fay & Conkey to their creditors, no matter how fraudulent they may have been.

The law in this State and elsewhere is well settled, that a simple contract creditor cannot assail a transaction by his debtor in conveying away his property in fraud of his creditors, without first having obtained a judgment against the debtor and the return of an execution *nulla bona*.

Dormueil v. *Ward*, 106 Ill. 216.
Baxter v. *Moses*, 52 Am. Reports, 783.
Taylor v. *Bowker*, 111 U. S. 110.
Smith v. *R. R. Co.* 99 U. S. 398.
Case v. *Beauregard*, 99 U. S. 129.

The language of this court, in the case last cited, ought to dispose of this question.

"Without some constituted trust or lien, a creditor "has only the right to prosecute his claim in the ordinary "courts of law, and have it adjudicated before he can pur- "sue the property of his debtor by a direct proceeding in "equity."

We submit that the complainant's bill ought to have been and should be dismissed.

III.

The decree against the First National Bank.

The bank is entitled to the benefit of its lien, and to retain the money received by it upon execution out of the assets of Fay & Conkey before the bill was filed in this cause, unless prior to the time of extending credit to that firm, it had actual or constructive notice that the members of the limited partnership entered into a fraudulent agreement of dissolution.

The following must be conceded, or, if not conceded, are shown to be established facts in this case.

All of the requirements of the statute in relation to the dissolution of limited partnerships were fully and strictly complied with. In short, the firm was *legally* dissolved.

Due notice of such dissolution was given by publication and otherwise.

On and after the 2d day of December, 1882, the firm of Fay & Conkey had exclusive possession of the assets of the limited partnership, claiming to be the owners thereof, and from that time on carried on business under such firm name until its failure, purchasing and selling goods, and borrowing money in its own name, and upon its own credit, and paying off, as rapidly as it matured,

the indebtedness of Boies, Fay & Conkey assumed by it. The bill so alleges. (*Record, pp. 6 and 7.*)

On the 4th day of December the firm of Fay & Conkey opened its bank account at the First National Bank, and thereafter all deposits were made to its credit, all debts paid by its check, and all money borrowed upon its notes, either with or without collateral security or indorsement. The bank account of Boies, Fay & Conkey was closed December 6, 1882, and its outstanding checks thereafter paid by Fay & Conkey.

All of the parties composing the limited partnership of Boies, Fay & Conkey have testified that that firm was dissolved in good faith and without any fraudulent intent whatever, and their testimony is supported by their acts and the surrounding circumstances.

Overdrafts by Boies, Fay & Conkey during the fall of 1882 at the First National Bank were secured by warehouse receipts as collateral. (*Record, pp. 729, 740 and 741.*)

Between the 2d of December, 1882, and the 22d of January, 1883, the liability to the bank had increased to the extent of $30,945. Five thousand dollars of this increase was upon the unsecured notes of Fay & Conkey, and $7,000 upon their draft accepted by Graves. The entire indebtedness to the bank was discharged out of its securities, and the judgment by confession, except $888.55. (*Exh. B., Record, p. 1072.*)

Upon this question of notice to the bank, the court finds in its decree (*Bank Record, p. 69,*) as follows:

"That at the time of the pretended dissolution of the limited partnership in October, 1882, and on the 2d day of December, 1882, and later, the defendant, The First National Bank of Chicago, knew said limited partnership was insolvent and unable to pay all its creditors; that said bank knew that the contract of dissolution of limited partnership was a pretended one and entered into for the purpose of protecting the limited partner, Julius K. Graves, from

liability as such and as indorser for the firm, and that the bank co-operated with the members of the firm of the limited partnership for the accomplishment of such purpose; and the court further finds that for the purpose aforesaid, and to obtain an illegal preference over other creditors of the limited partnership, the judgment was confessed by Fay & Conkey in favor of the bank."

To appreciate fully upon what ground the court reaches the conclusion that the bank had notice of, and became a party to, the alleged fraudulent scheme, involves some discussion of the opinion. (See *Bank Record, pp. 60–68.*)

We state briefly the various transactions as detailed in the opinion, which the court finds to be evidence of bad faith upon the part of the bank, as follows:

An account was kept with the First National Bank, of which Gage was manager. In September, during Fay's absence, Graves told Gage he would be personally responsible for checks drawn by the firm's cashier. When Fay returned, he assured Gage, that, should the firm have trouble, the bank would be protected. Graves was a director of the Commercial National Bank of Dubuque, which kept an account with the First National Bank, and Graves and Gage were personal acquaintances or friends; Boies, Fay & Conkey overdrew their bank account at various times during the fall of 1882; on October 18th, Gage made a loan to Boies, Fay & Conkey, with warehouse receipts as collateral; after the publication of dissolution notice the bank paid checks of Boies, Fay & Conkey, and charged the same up to the account of Fay & Conkey; December 8th it made a demand loan to Fay & Conkey upon warehouse receipts; December 14th the bank protested a note of Boies, Fay & Conkey, indorsed by Graves, held by the Dubuque County Bank; the bank discounted customers' paper of Fay & Conkey January 20th; two notes of Boies, Fay & Conkey, for

$5,000 each, were taken up January 20th, when Fay & Conkey had unsecured notes maturing earlier; such payment was made after Fay & Conkey had decided to suspend; Flower, Remy & Gregory were counsel both for Graves, Fay & Conkey and for the bank, and on January 20th a consultation was had in which Gage stated that he would be satisfied with a judgment note for $40,000, and it was agreed that the bank's execution should be the first lien; the substitution of a large amount of the notes of Fay & Conkey for notes of Boies, Fay & Conkey. Graves needed the aid of the bank to accomplish his purpose, and it co-operated with him through Gage. Gage testified that he did not know that a limited partnership could not prefer creditors until after judgments had been confessed. On the 28th, 29th and 30th days of December the bank took three unsecured notes of Fay & Conkey for $5,000 each, in renewal of notes of Boies, Fay & Conkey, maturing on those days. On January 9th and 10th the bank discounted two more unsecured notes of Fay & Conkey for $5,000 each. Gage doubted the solvency of Fay & Conkey as early as December 28th, when he took the first of the unsecured notes in exchange for the limited partnership note, and released Graves from liability.

We quote the balance of the opinion, as follows:

"Remy wrote the dissolution contracts, and Flower, Remy & Gregory were the general counsel of the firm, made collections for it, and from time to time gave the partners legal advice. It does not appear from the testimony that the members of the limited partnership had any reason for keeping their counsel ignorant of the firm's condition and purposes, or of Graves' retirement as a partner. It was known to the members of the limited partnership, and to the bank, that Flower, Remy & Gregory were counsel for both, *and it is not unfair to assume, as I do, that any information that the counsel had of the condition and purpose of the insolvent firm, which it was material for the bank to know, was communicated to Mr. Gage.*

"If the counsel knew that the limited partnership was insolvent or threatened with insolvency, as I think they did, and that it had been dissolved, and did not communicate that information to the bank, they were unfaithful to

it. The mere fact that Flower, Remy & Gregory continued to maintain the relation of counsel of the limited partnership, as well as its alleged successors and also of the bank, indicates that the latter knew the financial condition of the firm, and that there was co-operation between them. But, even if the bank in good faith continued to deal with the limited partnership, and afterward with Fay & Conkey as the successors of it, without knowledge of anything indicating insolvency or threatened insolvency on the part of either, and that Graves had ceased to be a special partner, *the bank was bound by the knowledge which its counsel had upon those subjects.*

The most of the facts which the court discusses in its opinion we concede to be established; but we do not think they sustain the conclusions drawn from them.

The following facts, which he claims to be such in his opinion, are either not sustained at all by the evidence or are satisfactorily explained.

There is no proof in the case that Fay assured Gage that the bank would be protected after his return in the fall of 1882. The only testimony on the subject is that of Benjamin B. Fay (*Record, p. 348*), wherein he states that at some time in the year 1882, and once the year previous, he told Gage in case of trouble the bank should be protected. Just when in 1882 this conversation took place, no one can state. It may have been in the early part of the year, before the limited partnership was organized, or during its existence, or after its dissolution. It would be reasonable to presume that it might have been made at or about the time that the liability of Fay & Conkey was increased, in January, 1883.

The overdraft by Boies, Fay & Conkey in the fall of 1882 was secured by warehouse receipts. (See testimony of Gage, *Record, pp. 740, 741.*)

The transaction with reference to the protesting of the note December 14, 1882, is explained by Mr. Fay in his testimony upon page 967 of the record, by his statement that he supposed that the note was payable at his office,

and he did not ascertain to the contrary until it was too late to pay it upon that day. It was returned and paid without delay.

At the time that the notes of Boies, Fay & Conkey were taken up, January 20, 1882, there was no paper of either firm past due. It was wholly immaterial to Graves or to the bank what notes were taken up, for the reason that Graves, as special in Boies, Fay & Conkey, was not personally liable upon its paper, nor was he liable upon the notes of either firm, except so far as he had made himself so by indorsement. It does not appear that the notes of Boies, Fay & Conkey which were paid January 20th, had his indorsement on them. This payment was made before it had been ascertained that the firm would have to suspend, instead of afterward as is shown by the testimony of all of the parties who have testified on that subject. Graves and Fay both testify that the payment was made in the forenoon, and so does Gage. The situation of the firm was not ascertained by Graves until about one o'clock, and it was not until after that hour that it was ascertained that failure was inevitable.

The renewal of the notes of Boies, Fay & Conkey in December, and the giving of new notes in January by Fay & Conkey, was the only way in which the bank would have taken a renewal or would have loaned money. It certainly would not do it on Boies, Fay & Conkey's paper, as that partnership was out of existence. Fay & Conkey had the assets, and were a live firm, and, if notes were to be discounted for the purpose of raising money to pay Boies, Fay & Conkey's paper, they would necessarily have to be executed by Fay & Conkey, and not by Boies, Fay & Conkey.

We do not see how any inference can be drawn from

these facts of an agreement to protect Graves, or that the bank co-operated with him for that purpose.

The finding of the court, that the counsel of the bank knew that a fraudulent scheme existed, and communicated the same to the bank, is not only wholly unsupported, but is most emphatically contradicted, by the evidence.

The legal conclusion at which the court arrives, that the bank is bound by the knowledge of its counsel, even though it be not communicated, is not sustained by any authority.

1. *Did the counsel of the bank know the intent and purpose of the partners in dissolving the limited partnership?*

The agreement was drawn in the office of Bonney, Fay & Griggs, and acknowledged before J. Edwards Fay, who attended to its publication and filing. The firm of Flower, Remy & Gregory were not consulted about it, and Remy did not draw it.

All that the bank counsel had to do with the matter was to represent Boies two days later, at which time they acted adversely to the interests of the other partners. The only dispute was as to the amount that Fay & Conkey should pay Boies for his interest, and, after that was settled, nothing remained to be done but to draw the necessary papers, so as to transfer such interest and indemnify Boies as against the debts of the firm. There was no occasion to discuss the solvency of the limited partnership and the reasons for dissolving it, and they were not discussed. Boies, Fay, Conkey, Graves and Remy so testify, and the documentary evidence sustains them. Graves never employed, nor consulted with Flower, Remy & Gregory on any subject, nor at any time, until the aft-

ernoon of January 20, 1883. (See *Record, pp. 815, 833, 881, 915, 967, 972, 1033, & pp. 34 to 40 supra.*)

But the court says, there would seem to be no reason for keeping counsel ignorant of the firm's condition and purposes.

If any credence is to be given to the testimony of the four partners, that they had no knowledge of their insolvency, and that their dissolution was made in good faith and for the reasons which they gave, we submit that it is hardly fair to charge knowledge to the counsel, and through them to the bank, of the existence of facts not known to the parties themselves, and of a secret fraudulent intent and purpose which they all deny that they ever entertained.

2. *Is the bank bound by the knowledge of its counsel of the condition and purposes of the limited partnership?*

If Flower, Remy & Gregory had any knowledge whatever of the solvency of Boies, Fay & Conkey, or of the secret intent and purpose of its members in dissolving the limited partnership, it could only acquire the same as a confidential communication while acting professionally for said firm.

Is it a presumption of law, that counsel is bound to communicate information so obtained to another client, at the risk of incurring the charge of being unfaithful if he does not?

If actuated by a decent regard for his professional obligations to one client, he has omitted to divulge such communication to another, will the law presume that his knowledge is that of his client, when to make it such would be infamous?

Such seems to be the opinion of the Circuit Judge, but we do not so understand the law.

The general and well settled rule upon this subject is laid down in Wade on Notice, 2d edition, sec. 692, in the following language:

"Where knowledge of a fact was acquired by an "attorney while in the course of the discharge of his "duties, under circumstances that would render it a breach "of professional confidence for him to communicate the "fact to another client, or to take advantage of such "knowledge to promote the interest of another client, the "knowledge of the attorney would not be imputed to his "client from whom it was so withheld."

Hood v. *Fahnestock*, 8 Watts, 480.
McCormick v. *Wheeler*, 36 Ill. 115.
Campbell v. *Benjamin*, 69 Ill. 244.
Harrington v. *McCullom*, 73 Ill. 476.

The three Illinois cases above cited hold the following: "A party cannot be charged with notice of facts within "the knowledge of his attorney, of which facts the latter "acquired such knowledge while acting as the attorney of "another person." "To establish a rule to the contrary," the court says; "would be manifestly unjust, and in many cases its effect would be disastrous upon the interests of parties who are compelled to employ attorneys."

The bank cannot be prejudiced by anything disclosed upon the books of Fay & Conkey, or by oral testimony as to their methods of doing business after the 2d of December, when they took open and notorious possession of the assets, unless it appears that the contents of such books or their methods of doing business were brought to its notice.

The action of the bank in the premises can only be accounted for upon the ground that they were dealing

with these parties in the utmost good faith, and with at least a fair measure of confidence in their solvency and ability to discharge their obligations, based largely, if not entirely, upon their possession and apparent ownership of the assets of the limited partnership.

IV.

THE DECREES ENTERED IN THIS SUIT ARE ERRONEOUS AND INEQUITABLE.

1. The court has decreed that all the property and effects held by the limited partnership on the 20th day of August, 1882, and subsequent thereto, and when the said judgments were confessed, were a special trust fund for the payment of the firm debts ratably among its creditors; that Graves pay to the clerk of the court the several sums paid to him; to the Commercial National Bank of Dubuque; to the Dubuque County Bank, and to the Importers and Traders' Bank, with interest, out of the assets of the limited partnership; that Flower, Remy & Gregory pay to the clerk $9,886.57; Benjamin B. Fay, $1,014.48; Conkey, $1,349.48. (*Graves' Record, pp. 153 to 159.*)

In addition, the court finds by said decree that there was paid to certain other creditors of the limited partnership out of this trust fund the following sums of money:

To the Bay State Sugar Refining Co. -	$2,000.00
To the same company on the judgment in favor of Shumway - - - - -	1,398.00
To Hiram A. Sheldon - - - - -	1,100.00
To Martha J. Fay - - - - - -	740.00
To Addison B. Robinson - - - -	220.00
To the First National Bank of Westborough	2,400 00
To Walter Potter - - - - - -	860.00
To the First National Bank of Chicago, Feb. 26, 1883 - - - - - -	40,000.00

The decree against the bank was entered in 1888, after it had been ascertained that prior decrees were uncollectible or insufficient to discharge the full indebtedness of Boies, Fay & Conkey. The record shows no decrees against the other judgment creditors above named.

The purpose of the bill, and of the decree, is based upon the theory that all of the assets belonged to the creditors of the partnership of Boies, Fay & Conkey, and that such creditors are entitled to be paid in full before the creditors of Fay & Conkey receive anything. It also seems to have been the opinion of the Circuit Court that the creditors of Fay & Conkey who had received security upon their claims were not entitled to any consideration in any adjustment that might be made of the equities as between creditors. In other words, the court held that enough should be paid back by the judgment creditors, to discharge the limited partnership liabilities in full, the court reserving the right to designate which of them should pay back, instead of requiring all of them to do so.

All of the judgment creditors affected by the decrees are *bona-fide* creditors of the general partnership of Fay & Conkey, whose claims were created with knowledge of the dissolution of the limited partnership, and without knowledge of any fraudulent intent to evade the law. Credit was given to Fay & Conkey upon their apparent good title to, and their possession of, the assets.

Their creditors seem to have regarded the assets of Fay & Conkey as liable to be first applied to the payment of the creditors of that firm. Their right to have their debts thus paid, appeals as strongly to the conscience of the chancellor as does the right of the creditors of Boies, Fay & Conkey to have their debts paid out of the assets of Boies, Fay & Conkey. If one is a trust estate, the

other is. The equities are equal. Ought the court to take the assets from the creditors of Fay & Conkey, and give them to the creditors of Boies, Fay & Conkey?

The creditors of Fay & Conkey have this advantage, or did have before the decree in this case was rendered. They had obtained legal possession of the assets of Fay & Conkey, and were entitled to hold them as against the creditors of any other firm of which Fay & Conkey might be members, or as against the individual creditors of either Fay or Conkey.

The rule is "that when the equities are equal, the law shall prevail," and this maxim was applied in a case (analogous to this one) of two trust estates in the case of *Thornedyke* v. *Hunt*, 3 De G. & J., 563.

It follows, therefore, that, as between the two classes, the creditors of Fay & Conkey, having possession of and a lien upon the assets, were entitled to priority, and to hold the same and the proceeds thereof as against creditors of the limited partnership of Boies, Fay & Conkey, and the court should have so decreed.

2. If, however, this court should be of the opinion that the decree of the court below giving priority to the creditors of the limited partnership was correct to that extent, we still maintain that such decree is inequitable and unjust.

Having obtained jurisdiction of the trust fund and of the parties, it should have settled and determined the rights of the parties, and provided for an equitable distribution of such fund. The decree should have required that all of the parties receiving any preferences or obtaining any portion of such fund, should surrender or pay back the same, and that all creditors, of whatever class, should be entitled to prove up against the estate, the

creditors of Boies, Fay & Conkey to be paid in full under the decision of the court, and the surplus to be divided equally and ratably among the creditors of Fay & Conkey. No other disposition of the case could be made which would do justice to all of the parties in interest. As the case now stands, the decree declares the title of the property to be in the limited partnership, and divides the creditors of the two firms into five classes:

1. Creditors of the limited partnership who are to be paid in full.

2. Creditors of Fay & Conkey who have been paid in full, and who are permitted to retain such payments.

3. Creditors of Fay & Conkey who have received a portion of their claims, and are permitted to retain the same.

4. The First National Bank of Chicago, which is required to pay back $50,000, and is not permitted to prove its claim at all, or to receive any portion of the fund.

5. Graves, who, as a creditor of Fay & Conkey, has received nothing upon the note taken by him for his special capital, and who is required to pay at least $70,000 of money which has been received and retained by creditors upon claims of Fay & Conkey, indorsed by him, without right to prove up as a creditor and share in said fund.

If equality be equity, this is certainly not equity, and is not in accordance with the principle laid down by this court in the case of *White* v. *Cotzhausen*, to the effect that an attempt to obtain an illegal preference ought not to have the effect of depriving parties of their interest under the statute in the proceeds of the property upon which they held such liens.

V.

JURISDICTION.

The Circuit Court had no jurisdiction of this cause, and no right to enter a decree herein.

The record shows that the complainant, Chester C. Corbin, and the defendants, the Bay State Sugar Refining Company, the First National Bank of Westboro, Alvin F. Shumway and Walter Potter, were at the time of the commencement of this action, and at the time the same was transferred to the Circuit Court of the United States for the Northern District of Illinois, all citizens of the State of Massachusetts (*Record, pp. 32–33*), and that the four defendants named have each of them received a portion of the trust fund belonging to the estate. Such being the fact, we respectfully submit that no final decree can be entered in this suit for want of jurisdiction in the United States Court.

If the assets in controversy constitute a trust fund for the benefit of creditors of the limited partnership, it follows necessarily and logically that, in order to make an equitable distribution of said estate, all parties who have received any portion thereof are necessary and proper parties to a bill in equity to recover back, and to make an equitable distribution of the same among the parties entitled thereto. In a matter involving a trust and the distribution of a trust fund, there can be no such thing as a separate controversy between the party seeking to establish and execute the trust and any one of the persons who have received a portion of the fund. All must be compelled to pay back, in order to bring the entire fund into court, and, until that is done, no equitable distribution of the estate can be made which will deal justly and fairly with all of the parties interested.

It is well settled, and has been for many years, by the adjudications of this court, that the record must show citizenship in order to confer jurisdiction when that is the ground relied upon. All of the defendants must be citizens of a different State from that of the plaintiff. A failure to aver citizenship is fatal, and the court has no jurisdiction. A party may assign for error want of jurisdiction of the court in which he himself has instituted the suit, even though he be the one in fault.

Capron v. *Van Norden*, 2 Cranch, 126.
Breithaupt v. *The Bank of the State of Georgia, et al.*, 1 Peters, 238.
Brown v. *Keene*, *8 Pet. 112.*
American Bible Society v. *Price*, 110 U. S. 61.

Nor can a suit be removed from the State court into the United States Court unless all the parties on one side of the controversy are citizens of different States from those on the other, or unless the controversy is a separable one.

Sewing Machine Co. Case, 18 Wall, 553.
Van Nevar v. *Brandt*, 21 Id. 41.
American Bible Society v. *Price*, 110 U. S. 61.

We respectfully submit that the decrees herein should be set aside, and that this suit should be dismissed for want of jurisdiction, or be sent back to the Circuit Court with directions to remand the same to the State courts.

VI.

Constructive assignments.

Were it not for the recent decisions of this court in *White* v. *Cotzhausen*, 129 U. S. 329, we should think it

wholly unnecessary to discuss the proposition as to whether the transactions set forth in the bill constituted an assignment with preferences.

We do not think they can be so held, for the following reasons:

1. No foundation is laid for such relief in the pleadings.

The controversy is between the creditors of two firms, the gist of it being as to which of the two, certain assets belong, and the rights of creditors as to priority depending upon the result of that controversy.

If the creditors of the limited partnership prevail, the alleged transfers are void, and those creditors share equally and ratably in the assets.

If the creditors of Fay & Conkey prevail, and the assets are held to belong to that firm, then the creditors of Boies, Fay & Conkey cannot complain, because they are not creditors of Fay & Conkey.

If they should claim to be so, they would be compelled to abandon their priority, as they would be estopped from asserting that the dissolution was invalid. They are not entitled to be considered creditors of the firm of Fay & Conkey so long as they seek to take away from it the assets which were the consideration of the promise to pay the limited partnership debts.

2. No one has a right to assert that the transfers made by Fay & Conkey constitute an assignment with preferences, except the creditors of that firm, and none of them have done so.

3. The United States Courts have no jurisdiction to declare the transfers in question a constructive assignment, for the reason that the *complainant and four of the necessary defendants are citizens of the same State.*

All of the transactions and proceedings which operate to create a constructive trust are a proper subject of inquiry; and all the persons to whom transfers or preferences are made are necessary parties to the declaration and enforcement of such trust.

It is the series of transactions by which a debtor divests himself of his entire assets for the benefit of a portion of his creditors at the expense of the remainder, that is the foundation of such a proceeding, and not a transfer to one creditor which operates simply as a pledge of a part of the debtors' assets for his benefit.

4. In *White* v. *Cotzhausen*, *supra*, this court has given a construction to the assignment law of Illinois, which up to the present time has not been sanctioned by the Supreme Court of that State. That court has never yet held in any case, that a series of transactions would be construed to be an assignment with preferences, *unless such transfers were made in contemplation of and followed by a deed of assignment*.

This was the situation of affairs in the case of *Preston* v. *Spaulding*, 120 Ills. 208, which this court relied upon in its decision, and the doctrine of which it has extended so far as to unsettle all transactions for five years past which by any possibility could be held to be an assignment with preferences, although no assignments were contemplated, and none, in fact, made.

The Illinois Supreme Court practically determines, in *Preston* v. *Spaulding*:

"That, where a debtor 'reaches the point where he is ready and determines to yield the dominion of his property, *and makes an assignment for the benefit of his creditors, under the statute*, this act declares that the effect of such assignment shall be the surrender and conveyance of all his estate, not exempt by law, to his assignee; rendering void all preferences, and bringing about the distribution of his whole estate, equally, among his *bona-fide* creditors; and we hold that it is within the spirit and intent of the statute, that, when the

debtor has formed a determination to voluntarily dispose of his whole estate, and has entered upon that determination, it is immaterial into how many parts the performance or execution of his determination may be broken, the law will regard all his acts, having for their object and effect the disposition of his estate, as parts of a single transaction; *and on the execution of the formal assignment, it will, under the statute, draw to it, and the law will regard as embraced within its provisions,* all prior acts of the debtor having for their object and purpose the voluntary transfer or disposition of his estate to or for creditors; and if any preferences are shown to have been made or given by the debtor to one creditor over another in such disposition of his estate, full effect will be given the *assignment,* and such preferences will, in a court of equity, be declared void, and set aside, as in fraud of the statute." (P. 218.)

And again, on page 219, the court say:

"This voluntary assignment act is, in its character, remedial, and must, therefore, be liberally construed, and no insolvent debtor, having in view the disposition of his estate, can be permitted to defeat its operation by effecting unequal distribution of his estate *by means of an assignment, and* any other shift or artifice under the forms of law."

The views entertained by that court as to the necessity of the execution of an actual voluntary assignment in order to reach transfers of property made in contemplation of the assignment, and therefore forming a part of it, are supported by the following additional authorities in said State.

Schroeder v. *Walsh*, 120 Ill. 403.
Field v. *Geohegan*, 125 Ill. 68.
Hanford Oil Co. v. *Bank*, 126 Ill. 584.
H. & L. Bank v. *Rehm*, 126 Ill. 461.
Farwell v. *Cohen*, 21 Chicago Legal News, 359.

In *Schroeder* v. *Walsh*, *supra*, 403, which was decided at the same term of the Supreme Court as the case of *Preston* v. *Spaulding*, the court held as follows:

"In the absence of any bankrupt law, or statute, to the contrary, the law is well settled that a debtor in failing circumstances, *not seeking the benefit of the general assignment law*, may prefer one creditor to another equally meritorious, if done in good faith."

(Citing authorities.)

"The statute relating to assignments by debtors for the benefit of their creditors, and prohibiting preferences in such assignments, has no application to a case of this kind. Notwithstanding that statute, a debtor may pay one creditor in full, either in money or by the sale of his property. That act applies only to conveyances of property to an assignee or trustee, in trust, to convert the same into money for the benefit of the creditors of the assignor, *which can now only be made under that law.*"

Citing *Hanchett* v. *Waterbury*, 115 Ill. 220.

In *Field* v. *Geohegan*, *supra*, where a note and warrant of attorney were given to Field thirty days before execution of an assignment, upon which judgment was entered on the same day the assignment was made, and execution delivered to the sheriff a short time before the assignment was executed, without the debtor's having anything to do with the entry of judgments or determining the time when they should be entered, the court held as follows:

"A creditor always has a right to take every precaution to save or secure his debt, and the fact that he delays until the debtor may be on the eve of bankruptcy is no argument against the good faith of his acts. Had the warrants of attorney, under which the defendants in error obtained priority, been executed after the debtors *contemplated an assignment, and on the eve of an assignment, then they might be regarded as a part of the assignment, and obnoxious to the statute.*"

There was no proof in this case that the debtors contemplated making an assignment at the time the note and warrant of attorney were given.

In the case of *The Hanford Oil Co.* v. *The First National Bank*, 126 Ill. *supra*, the court uses the following language:

"Notwithstanding the Voluntary Assignment act, a debtor, though insolvent, may still secure, by mortgage or confession of judgment, or otherwise, a *bona-fide* indebtedness, if done in good faith, *and not in contemplation of making an assignment under said act.* When, however, the debtor enters upon a course of conduct having for its object the disposition of all his estate for the benefit of his creditors, and, *as part of the plan by which to effect that object, executes a general assignment*, the distribution must be to his creditors in proportion to the amounts of their respective claims. This question was be-

fore this court in a case of very considerable importance, and there received full consideration; and we then, with entire unanimity, announced the doctrine, that any preference obtained by the creditor, by or through the acts of the debtor, after the debtor had determined to yield dominion of his estate *by making a general assignment for the benefit of creditors, fell within the prohibition of the statute and was therefore void.*" (Citing *Preston* vs. *Spaulding.*)

"All the acts of the debtor performed with the intent and for the purpose of effecting a disposition of all his property for the benefit of his creditors, are to be regarded as a single transaction, each constituting part *of the general assignment of his assets under the statute.*"

In this case the note and warrant of attorney were executed long prior to the assignment, but, before entry of judgment, the bank received notice of the intended assignment, and was in consultation, by its attorney, with the assignors, and was, in effect, put in motion by the act of the debtors; and it subsequently, by arrangement with the assignee, surrendered possession of the assets, upon which its levy had been made, upon the condition that the lien of its judgment should be protected and paid out of the funds realized from the sale of such assets.

This view of the subject is again reiterated by the Supreme Court in the case of the *Hide & Leather National Bank* v. *Kehm, supra.* The court uses the following language:

"Since the decision of this court in *Preston* v. *Spaulding*, 120 Ill. 208, the law must be regarded as settled in this State that, after a debtor has made up his mind to *make an assignment of his property for the benefit of his creditors*, all conveyances, transfers and other dispositions of his property or assets, *made in view of his intended general assignment*, whereby a preference is given, will be held to be within the prohibition of the statute and void, *the same as though incorporated in the deed of assignment itself.*"

The latest decision upon this subject, however, is the one of *Farwell* v. *Cohen*, decided in the summer of 1889, and not yet reported, but published in the 21st *Chicago Legal News*, page 359. In this case, which is one involving the jurisdiction of the County Court to remove a trustee and appoint a successor, *where no statutory assign-*

ment was in fact executed, the instrument under which the County Court claimed jurisdiction, and based its proceeding, recited, that the debtor was indebted to certain persons, and desired to secure the same, and purported to sell, assign and transfer a stock of goods and certain personal property to one Cohen in trust to sell the same, and out of the proceeds pay the indebtedness therein mentioned. Cohen assumed the trust, and was proceeding to execute it as directed. The instrument, however, under which he acted, was not acknowledged nor recorded, as required by statute, nor was an inventory filed, nor appraisement made, with the clerk of the County Court, nor did the trustee enter into a bond. Creditors applied to the County Court for the appointment of a new assignee, and obtained an order removing Cohen, and appointing one Thompson, as assignee in his place.

The court held that the County Court had no jurisdiction, and discussed at length the whole subject of voluntary assignments under the Illinois act regulating the same.

The court decided that the voluntary assignment for the benefit of creditors mentioned in that act has no other meaning than it had before the passage thereof; that assignments had well defined signification in this State and all other States long before 1877, and, according to the common acceptation of the term, it is a transfer without compulsion of law by a debtor of his property to an assignee in trust, to apply the same or the proceeds thereof, to the payment of his debts, and to return the surplus to the debtor; that it has always been understood in Illinois to be a written deed of conveyance, executed by the assignor, as party of the first part, to the assignee, as party of the second part, reciting the grantor's indebted-

ness and inability to pay, and conveying his property, real and personal, by apt words of sale and transfer to the assignee in trust, to take possession of and sell the same and to collect the outstanding debts, and out of the proceeds to pay the creditors. Sometimes it provided for preferences, and sometimes not. Schedules were generally attached to the deed, describing the property and naming the creditors. That the first sentence of the first section of the act of 1877 assumes that the meaning of a voluntary assignment for the benefit of creditors is already well understood, and, therefore, no new definition of the term is attempted The assignment contemplated by the act, it is stated, must be in writing, because it is required to be acknowledged and recorded.

We quote as follows:

"The assignment contemplated by the act *must be one single instrument of transfer*. It is so treated and spoken of in almost every section. The debtor is required to annex to it an inventory of his property and a list of his creditors, and although the absence of these does not make it fraudulent or void, yet an instrument to which an inventory and list may be attached *cannot very well be constructed out of a number of acts done by the debtor, or out of a number of notes, mortgages or other documents signed by him and passed out of his hands into the possession of different parties.* * * *

"The contents of the assignment mentioned in the act must be substantially the same as those of the ordinary deed of assignment referred to in the text-books and judicial decisions. * * *

"*We are of the opinion that the act contemplates no such thing as a constructive assignment.*"

The court also refers in its opinion to the case of *Preston* v. *Spaulding*, and uses the following language:

"That case originated in a bill in chancery filed in the Circuit Court, a court of general equity jurisdiction. The main point there decided, was that, *where a creditor was about to make a formal assignment for the benefit of his creditors, and had fully made up his mind to do so*, instruments then made by him for the purpose of giving preferences to particular creditors would, in a court of equity, be set aside *the same as though incorporated in the deed of assignment itself.*"

If it should be necessary, in the disposition of this case, to consider the doctrine of constructive assignments under the insolvent law of Illinois, we trust that the court will re-examine the question, and so far modify its former conclusions as to be in harmony with the views expressed by the Supreme Court of that State.

While it may not be necessary for this court to pass upon all of the propositions of law and fact, we respectfully submit that upon one or more of the errors assigned, the decrees herein should be set aside, and the case remanded with directions to dismiss the bill.

J. M. FLOWER,
Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1888.

JULIUS K. GRAVES *et al.*, Appellants,
vs.
CHESTER C. CORBIN, Appellee. } No. 430.

FIRST NATIONAL BANK OF CHICAGO *et al.*,
Appellants,
vs.
CHESTER C. CORBIN, Appellee. } No. 1367.

The appellee and other creditors claiming under his orig inal bill, by Wm. J. Manning, their solicitor, object to appellant's motion to extend the provisions of rule 10 so as to permit only a part of the record in said case No. 430 to be printed—

1st. Because on September 10, 1888, when appellee, by stipulation, consented that the record now on file (and not printed) on the said Graves' appeal might be used in this court as a part of the record in said First National Bank's appeal, it was agreed that the record so made should (as appellee understood the agreement in said stipulation), constitute (without diminution) a part of the record on said Bank's appeal, and said cases have been consolidated under such agreement, and reference is here made to said stipulation filed herein.

2d. Because all the testimony taken and the pleadings filed and proceedings had in the court below prior to the entry of the decree against said Graves *et al.* in case No. 430

are material and relevant to the issues involved between the appellee and the creditors claiming under him and the appellant, said First National Bank—all the other defendants, except Boiss, Fay, and Conkey, having settled and adjusted the claims made against them by said appellee—this being an appeal from a decree in chancery wherein the circuit court of the United States for the northern district of Illinois found the appellants guilty of fraud under the limited partnership law of Illinois and of receiving unlawful preferences.

WM. J. MANNING,
Solicitor for Appellee.

Endorsed: U. S. Supreme Court. No. 430. Julius K. Graves *et al.*, appellants, *vs.* Chester C. Corbin, appellee. No. 1367. First National Bank of Chicago, appellant, *vs.* Chester C. Corbin, appellee. Objection to motion of appellants to extend provisions of rule 10 relating to printing of record. Wm. J. Manning, solicitor for appellee.

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1st. Because on September 10, 1888, when appellee, by stipulation, consented that the record now on file (and not printed) on the said Graves' appeal might be used in this court as a part of the record in said First National Bank's appeal, it was agreed that the record so made should (as appellee understood the agreement in said stipulation), constitute (without diminution) a part of the record on said Bank's appeal, and said cases have been consolidated under such agreement, and reference is here made to said stipulation filed herein.

2d. Because all the testimony taken and the pleadings filed and proceedings had in the court below prior to the entry of the decree against said Graves *et al.* in case No. 430

are material and relevant to the issues involved between the appellee and the creditors claiming under him and the appellant, said First National Bank—all the other defendants, except Boiss, Fay, and Conkey, having settled and adjusted the claims made against them by said appellee—this being an appeal from a decree in chancery wherein the circuit court of the United States for the northern district of Illinois found the appellants guilty of fraud under the limited partnership law of Illinois and of receiving unlawful preferences.

WM. J. MANNING,
Solicitor for Appellee.

Endorsed: U. S. Supreme Court. No. 430. Julius K. Graves *et al.*, appellants, *vs.* Chester C. Corbin, appellee. No. 1367. First National Bank of Chicago, appellant, *vs.* Chester C. Corbin, appellee. Objection to motion of appellants to extend provisions of rule 10 relating to printing of record. Wm. J. Manning, solicitor for appellee.

FILED.
NOV 30 1889
JAMES H. MCKENNEY,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

JULIUS K. GRAVES,
Appellant,
No. 155. *vs.*
CHESTER C. CORBIN,
Appellee.

THE FIRST NATIONAL BANK OF CHICAGO,
Appellant,
No. 980. *vs.*
CHESTER C. CORBIN,
Appellee.

Appeals from the Circuit Court of the United States for the Northern District of Illinois.

Consolidated for purposes of hearing, by order of the Supreme Court.

BRIEF AND ARGUMENT OF APPELLEE.

WM. J. MANNING,
COUNSEL FOR APPELLEE.

JANSEN & GUNTHORP PRINT, CHICAGO.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

JULIUS K. GRAVES,
Appellant,
vs.
CHESTER C. CORBIN,
Appellee.

THE FIRST NATIONAL BANK OF CHICAGO,
Appellant,
vs.
CHESTER C. CORBIN,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The above appeals were consolidated by consent of the parties, for the purpose of being heard as one case, by an order entered in this court on October 29, 1888.

Brief and Argument of Appellee.

May it please the Court:

This is a bill filed on March 1, 1883, in the Circuit court in Cook county, Illinois, by appellee in behalf of himself and of all other creditors of the insolvent limited copartnership of Boies, Fay & Conkey, under the provisions of the twenty-second and twenty-third sections of chapter 84 of the revised

statutes of the State of Illinois, entitled an act to revise the law in relation to limited partnership, in force July 1, 1874, charging this firm of wholesale grocers with defrauding their creditors, and with making unlawful preferences to Julius K. Graves, the special partner in said firm, and to the First National Bank of Chicago, and others, under certain judgments unlawfully confessed in their favor on January 22, 1883, by Benjamin B. Fay and Lucius W. Conkey, two of the members of said insolvent limited partnership (*Graves* v. *Corbin*, Record pages 3, 36, 150 and 151.) Said sections 22 and 23 of chapter 84 of Illinois statutes read as follows:

Sec. 22. "It shall not belawful for any partnership,nor any member thereof, in contemplation of bankruptcy or insolvency, and with the intention and for the purpose of paying or securing any one or more of their creditors in preference to any other of their creditors, to make any sale, conveyance, gift, transfer or assignment of their property or effects, or to confess any judgment, or to create any lien whatsoever upon their property or effects; and every such conveyance gift, transfer or assignment involving such judgment or other lien shall be, and the same is declared to be utterly void."

Sec. 23. "In case of bankruptcy or insolvency of partnership, no special partner shall be considered or allowed to claim as a creditor under any circumstances, except for money loaned by him to such partnership, until the claims of all the other creditors of the partnership shall be satisfied."

[Hereafter in this brief we will designate the record in the *Julius K. Graves* v. *Chester C. Corbin* case as "Graves' Record," and the record in the *First National Bank of Chicago* v. *Chester C. Corbin* as "Bank Record."]

On the day the bill was filed, the defendants Boies, Fay Conkey, Flower, Remy, Gregory, and the First National Bank of Chicago, were served with summons. (Graves' Rec., 18.) On the 6th day of March, 1883, notices and subpœnas were duly served on Boies, Fay & Conkey (Graves' Rec., 20-24) that on March 12, 1883, the complainant would take the depositions of Boies, Fay, Conkey and Bradford Hancock before Charles S. Cutting, notary public. On March 10, 1883,

a subpœna *duces tecum* was duly served on William A. Boies, and one dollar and ten cents witness fees tendered him, requiring him to produce before said notary public, on March 12, 1883, certain books and papers of the firm. And on the same day a subpœna was duly served on Benjamin B. Fay and $1.10 witness fees tendered him, requiring him to attend as a witness on March 12, 1883. On March 13, 1883, said notary public filed his report (Graves' Rec., 20) stating "that "said Boies and said Fay wholly neglected and refused to "obey his subpœnas, and a rule was issued requiring said "Boies and Fay (Graves' Rec., 25) to show cause on March "15th, why they should not be attached for contempt of court "for their failure to attend as witnesses." On March 15, 1883, upon the hearing of the rule to show cause, the court held that ten days' notice instead of five days, should have been given for taking such depositions, and said rule was discharged. Graves' Rec., 26.) On March 16, 1883, an affidavit was filed (Graves' Rec., 26–7) showing that certain of the defendants were non-residents, and that the complainant desired to take the deposition of the defendants Boies, Fay, Conkey, Graves, Remy, Hancock, James M. Flower, and L. G. Gage. On March 21, 1882, Flower, Remy and Gregory filed and entered the appearance of the defendants Boies, Fay & Conkey. On March 24, 1883, (Graves' Rec., 28) default of defendants Flower, Remy, Gregory, Hanchett, Adams, and Murison was entered. On March 24, 1883, ten days' notice was given and subpœnas issued (Graves' Rec., 1225) by Charles L. Driesslein, notary public (who was afterward appointed commissioner to take the testimony in this cause in the United States Circuit court by Judge Drummond) and served, requiring the defendants Boies, Fay, Conkey and Remy to attend as witnesses on April 4, 1883. (Each of said witnesses accepting $1.10 as witness fees.) On March 26, 1883, publication notice (Graves'

Rec., 30), mailed to Julius K. Graves at Dubuque, Iowa. On March 30, 1883, stipulation filed setting aside default of 24th (Graves' Rec., 30) and defendants agreeing to answer by April 7, 1883. On March 31, 1883, subpoena *duces tecum* served on Bradford Hancock, receiver, requiring him on April 4, 1883, to produce all the books of account used by Boies, Fay & Conkey (Graves' Rec., 1224-25) in connection with their business, from March 30, 1882, to March 1, 1883. ($1.00 witness fees being paid to and received by said Hancock.) On April 1 or 2, 1883, Bradford Hancock sold without leave of court, as waste paper, nearly all the books and papers of Boies, Fay & Conkey, referred to in the writ served on him. On April 4, 1883 (being the day that Boies, Fay, Conkey, Remy and Hancock were required to attend as witnesses before Commissioner Driesslein, the defendant, The First National Bank of Chicago, by Flower, Remy & Gregory, its solicitors, filed a petition in the State court for removal of the cause (Graves' Rec., 32) to the Circuit court of the United States for the Northern district of Illinois. Said petition being verified by the affidavit of James M. Flower, and signed in behalf of the bank by L. J. Gage as vice-president. On April 11, 1883, leave was given the First National Bank of Chicago to file (Graves' Rec., 36) additional transcript of record from State court. April 18, 1883, amendments to original bill (Graves' Rec., 36) were filed. April 19, 1883, Bradford Hancock, receiver, made a party defendant. (Graves' Rec., 40.) April 24, 1883, defendant Julius K. Graves personally served (Graves' Rec., 42) with summons from United States Circuit court. On May 7, 1883, said First National Bank and others, by Flower, Remy & Gregory, their attorneys, filed a demurrer (Graves' Rec., 44) and said Boies, Fay & Conkey filed a plea (Graves' Rec., 47) to said appellee's bill.

On May 22, 1883, Judge Drummond after full argument,

overruled said demurrer and plea (Graves' Rec., 50) and ordered the defendants to answer complainant's bill.

On July 2, 1883 (Graves' Rec., 74-78) said bank and said Graves and others filed their answers.

On July 19, 1883, replications (Graves' Rec., 82-89) were filed.

On July 20, 1883, Charles L. Driesslein was appointed special examiner (Graves' Rec., 89) by Judge Drummond to take testimony in this case.

On November 5, 1883, a supplemental bill was filed charging that B. B. Fay had on October 21, 1882, fraudulently conveyed to Rufus E. Graves, a brother of Julius K. Graves, certain valuable real estate belonging to the limited partnership. (Graves' Rec., 89.)

On December 20, 1883, an attachment was issued against Julius K. Graves by Judge Drummond (Graves' Rec., 99) for his refusal to attend and testify before special examiner.

On January 10, 1884, the answers to supplemental bill were filed. (Graves' Rec., 100.)

On January 26, 1884, Robert E. Jenkins was appointed receiver by Judge Drummond. (Graves' Rec., 102.)

On March 20, 1884, with leave of court, the intervening petitions of Bondy, Lederer & Co. *et al.*, and of the Chicago Sugar Refining Company (Graves' Rec., 108), creditors of the said limited partnership to the amount of about seventy-five thousand dollars ($75,000) were filed.

From March 10th to 25, 1885, the case was on hearing (Graves' Rec., 140–8) in the court below, before His Honor Judge Gresham, and after argument taken under advisement.

On November 17, 1885, a decree was entered (Graves' Rec., 153–9) against the appellant, Julius K. Graves, for

one hundred thousand seven hundred and ninety-six dollars and seventy-one cents ($100,796.71), and against Flower, Remy & Gregory, for eight thousand five hundred and fifty-nine dollars and eighty cents ($8,559.80), in which decree the court reserved the right to decree against the creditors of said limited partnership in whose favor judgments were confessed.

On July 15, 1886, the appellee filed (Bank Rec., 33) a petition in the court below showing that two executions had been issued against the appellant Julius K. Graves for the amount of said decree, and a personal demand made by the marshal on him to pay the same, and that both said writs had been returned *nulla bona*, and praying for a decree against the appellant, the First National Bank of Chicago, for forty thousand dollars ($40,000), this being the amount received by said bank on February 26, 1883, under said confessed judgment in its favor.

On October 26, 1886, another petition was filed (Bank Rec., 35) by the appellee showing the return of said executions unsatisfied, and alleging that Graves possessed sufficient money, property and effects to pay and satisfy said decree. Whereupon the court below after reading and considering said petition, issued a rule (Bank Rec., 38) on said Julius K. Graves, requiring him to *personally* appear before said court on Saturday, October 30, 1886, at 10 o'clock A. M., and show cause why he should not be attached for contempt for failing to pay to the clerk of said court as ordered in its said decree of November 17, 1885. A copy of this rule was personally served on said Graves (Bank Rec., 49) on October 28, 1886, but he wholly ignored said writ and failed to appear, whereupon the hearing was continued until Monday, November 1, 1886, when after due consideration the court below found said appellant Julius K. Graves guilty of contempt of its authority, and ordered that an attachment issue for his arrest.

On January 23, 1888, the appellee Corbin, and a large number of intervening petitioners whose debts then allowed against said limited partnership, amounted to about one hundred and forty thousand dollars, ($140,000) (Bank Rec., 12-16), filed in the court below, their petition, (Bank Rec., 54-59), showing that nothing had been or could be collected from said Julius K. Graves in satisfaction of said decree against him. Also showing that, being unable to find said Graves in the Northern district of Illinois, the marshal for said district went to the city of Dubuque in the State of Iowa, where said Graves then resided, with said warrant for his arrest, and delivered the same to the district judge for the Northern district of Iowa, and requested said court to bring said Graves before that court for identification, to the end that he might be delivered to said marshal and returned by him to the jurisdiction of the court below. Also showing that although said Graves was present in said court during the hearing and arguments of counsel in support of such application, said district judge of the Northern district of Iowa refused to grant said marshal's request. Said petitioners in their said petition praying for a decree against the First National Bank of Chicago, for forty thousand dollars, ($40,000), this being the amount which the petitioners claimed had been unlawfully received by said bank under said confessed judgment in its favor.

On April 23, 1888, the court below rendered its decision upon said last named petition and application for decree (Bank Rec., 60-9), in which the court, Judge Gresham found:

"That said appellant, the First National Bank of Chicago, unlawfully received on February 26, 1883, thirty-eight thousand seven hundred and eight dollars and thirty-five cents ($38,708.35) as a preference over the appellee and other creditors, from a sale of the assets of said limited partnership."

On May 3, 1888, in conformity with said opinion, a decree was entered in the Court below against said Bank for fifty

thousand seven hundred twenty-one dollars and ninety-five cents ($50,721.95), this being said sum of $38,708.35, and six per cent interest thereon from February 26, 1883, to the date of the entry of said decree.

The appellants, said Julius K. Graves and said First National Bank of Chicago, now ask for a reversal of said decrees. Said Flower, Remy & Gregory having settled the decree rendered against them in the court below, and their appeal in this court having been dismissed, nothing but said Graves' and said Bank's appeals remain to be considered in this court. The second, third, fourth, eighth, eleventh, twelfth, thirteenth and eighteenth errors assigned by appellants are as follows: (Bank Rec., 165–6.)

2d. The Circuit court erred in its finding that the limited partnership of Boies, Fay & Conkey was insolvent August 20, 1882, and so continued to the termination of its business January 22, 1883, to the knowledge of each of the members thereof.

3rd. The Circuit court erred in its finding that the acts and proceedings of said firm and the members thereof, whereby they pretended to dissolve said limited partnership, were had and done with intent to defeat and evade the provisions of the Illinois statutes of limited partnership; that such acts and proceedings were void, and that said limited partnership was still subsisting at the time judgments were confessed by Fay and Conkey.

4th. The Circuit court erred in its finding that the said Judgments were confessed in the main for the purpose of preferring certain creditors of said limited partnership.

8th. The said Circuit court erred in decreeing that all the property and effects held by the limited partnership of Boies, Fay & Conkey on the 20th day of August, 1882, and subsequent thereto, and when the said judgments were confessed, were a special trust fund for the payment of the firm's debts ratably among its creditors.

11th. The Circuit court erred in its finding that at the time of the pretended dissolution of the limited partnership in October, 1882, and on the 2d day of December, 1883, and later, the said bank knew said limited partnership was insolvent and unable to pay all its creditors.

12th. The Circuit court erred in its finding that the bank knew that the contract of dissolution of the limited partnership of Boies, Fay & Conkey was a pretended one and entered into for the purpose of protecting the limited partner, Julius K. Graves, from liability as such, and as an endorser for the firm.

and that the bank co-operated with the members of the limited partnership for the accomplishment of such purpose.

18th. The Circuit court erred in its finding that, for the purpose of protecting said Graves, and to obtain an illegal preference over other creditors, a judgment was confessed by Fay and Conkey in favor of said bank.

18th. The court erred in all its findings and each of them.

As a better understanding of the findings of the court below can be had by considering the whole of such findings, we here insert the findings and decree of November 17, 1885, (Graves' Rec., 153, 159); the opinion filed in the court below on April 23, 1888, (Bank Rec., 60–69); and the decree entered against the First National Bank of Chicago on May 3, 1888. (Bank Rec., 69.)

DECREE OF NOVEMBER 17, 1888.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

TUESDAY, November 17, A. D. 1885.

Present: Hon. Walter Q. Gresham, circuit judge.

CHESTER C. CORBIN
vs.
WILLIAM A. BOIES, BENJAMIN B. FAY, LUCIUS W. Conkey, Julius K. Graves, The First National Bank of Chicago, John H. Lull, George E. Johnson, J. W. Doane, John R. Adams, Henry J. Sawdy, Mary Murison; The Commercial National Bank of Dubuque, Iowa; The Dubuque County Bank of Dubuque, Iowa; The Importers and Traders National Bank of New York City, The Merchants National Bank of Ohio; J. L. Dobbins, Alvin F. Shumway, Addison B. Robinson, The Bay State Sugar Refining Company of Massachusetts; The First National Bank of Westboro', Massachusetts; Hiram A. Sheldon, Martha J. Fay, D. C. Adams, The Necedah Lumber Company of Wisconsin; Walter Potter, James M. Flower, Curtis H. Remy, Stephen S. Gregory, Seth F. Hanchett, Sheriff of Cook County; Bradford Hancock, Rufus E. Graves, Mary C. Graves, Susan R. Fay, and George H. Tilden. } *In Chancery.*

This cause having heretofore come on to be heard upon the bill of complaint and amended and supplemental bill, the answers thereto, replications to such answers, and the proofs, documentary and written and the same hav-

ing been duly considered after hearing the arguments of counsel, the court finds that on the thirteenth day of March, 1882, a limited partnership was organized under the laws of Illinois by the defendants, William A. Boies, Benjamin B. Fay, and Lucius W. Conkey, a [as] general partners, and Julius K. Graves, as special partner, under the name and style of Boies, Fay & Conkey, to continue for five years; that said limited partnership immediately commenced doing business as wholesale grocers in the city of Chicago; that the said Julius K. Graves contributed fifty thousand dollars ($50,000) in money to the common stock of said limited partnership; that there was a private agreement between said partners whereby said Julius K. Graves was to receive interest on his special capital at the rate of twenty per cent. per annum, whether the business of said firm should be profitable or unprofitable, and that said Graves received from the assets of said limited partnership fifty-nine hundred dollars ($5,900) under such agreement, although said limited partnership made no profits.

The court further finds that on or about the twentieth day of August, 1882, said firm was insolvent, and so continued to the termination of its business with the knowledge of each of the members thereof, and with such knowledge the members of said firm continued to do business until the twenty-second day of January, 1883, when the said Fay and Conkey, assuming to be successors of Boies, Fay & Conkey, confessed judgments, as follows:

One in the Superior court of Cook county in favor of the First National Bank of Chicago for forty-two thousand dollars ($42,000).

Two in favor of said special partner, Julius K. Graves, one in this court for twenty-eight thousand three hundred and fifty dollars ($28,350.00), and the other in the Superior court of Cook county for eighteen thousand three hundred and seventy-five dollars ($18,375 00).

One in the superior court of Cook county in favor of John H. Lull for twenty-six hundred and twenty-five dollars ($2,625.00).

One in the Superior court of Cook county in favor of George E. Johnson for five thousand two hundred and fifty dollars ($5,250.00).

One in the Superior court of Cook county in favor of Mary Murison for sixteen hundred and twenty dollars ($1,620 00).

Two in the Superior court of Cook county in favor of J. W. Doane & Co., one for fifteen thousand seven hundred and fifty dollars ($15,750.00), and the other for ten thousand three hundred and forty-five dollars and eighty-three cents ($10,345.83).

One in this court in favor of the Commercial National Bank of Dubuque, Iowa, for fourteen thousand nine hundred and sixty-two dollars and fifty cents ($14,962.50).

One in this court in favor of the Dubuque County Bank of Dubuque, Iowa, for twelve thousand four hundred and ninety-five dollars ($12,495.00).

One in this court in favor of the Importers' and Traders' National Bank of New York for sixteen thousand and eight hundred dollars ($16,800.00).

One in this court in favor of the Merchants' National Bank of Middletown, Ohio, for four thousand five hundred and eight dollars and ninety-seven cents ($4,508.97).

One in this court in favor of J. L. Dobbins for eight hundred and eighty-two dollars ($882.00).

One in this court in favor of Addison B. Robison for eleven hundred and fifty-five dollars ($1,155.00).

One in this court in favor of the Bay State Sugar Refining Company for ten thousand and five hundred dollars ($10,500).

One in this court in favor of Alvin F. Shumway for seven thousand three hundred and thirty-nine dollars and fifty cents ($7,339.50).

One in this court in favor of the First National Bank of Westboro, Massachusetts, for twelve thousand and six hundred dollars ($12,600.00).

One in this court in favor of Hiram A. Sheldon for five thousand and seven hundred and fifty-five dollars ($5,755.00).

One in this court in favor of Martha J. Fay for three thousand eight hundred and eighty-five dollars ($3,885.00).

One in this court in favor of D. C. Adams for eighteen hundred and fifty-nine dollars and fourteen cents ($1,859.14).

One in this court in favor of The Necedah Lumber Company of Wisconsin, for fourteen hundred and seventeen dollars and fifty cents ($1,417.50).

One in this court in favor of Walter Potter for four thousand five hundred and fifteen dollars ($4,515.00).

And the court further finds that the members of said firm went through the form of a dissolution of said limited partnership for the purpose of defeating the statute of Illinois which prohibited insolvent limited partnerships from preferring creditors, and to defraud part of their creditors, and that the said limited partnership was still subsisting at the time of the commission and entry of each of the above mentioned judgments; that said judgments were confessed to prefer certain creditors, but chiefly to save said Graves from loss on account of said partnership and on account of liabilities incurred by him on commercial paper made by or on behalf said limited partnership.

That immediately after said judgments were entered in the Superior court of Cook county the said Graves and Fay caused executions to be issued thereon and delivered to the sheriff of Cook county, to whom they were directed, who, by their direction, levied said executions upon all of the stock in trade and merchandise of said limited partnership; that said sheriff sold said property at public sale, and with the proceeds, on February twenty-sixth, 1883, paid the First National Bank of Chicago on its said judgment fourty thousand dollars ($40,000.00), and on the same day paid to the said Julius K. Graves on

his said judgment in the Superior court of Cook county nine thousand seven hundred and ninety-one dollars and eighteen cents ($9,791.18); that the defendants, James M. Flower, Curtis H. Remy, and Stephen S. Gregory, composing the firm of Flower, Remy and Gregory, were employed as counsel by the said limited partnership, and by the said Graves on his own behalf to enter said judgments by confession, and to advise and represent said firm and said Graves in and about all matters and things affecting said insolvent firm and said Graves, and received from them twenty-five hundred dollars ($2,500.00) for services rendered and to be rendered in that behalf; that each of said judgments was confessed for the full amount due the several preferred creditors, and in some cases more than was due, and five per cent. in addition thereto for attorneys' fees, which latter amount was intended as a provision for said Flower, Remy & Gregory out of the assets of said insolvent and limited partnership; and that they, the said Flower, Remy & Gregory,did receive, without right, out of the assets of said firm on account of said attorneys' fee provision, eight thousand five hundred and fifty-nine dollars and eighty centy ($8,559.-80).

That on the twentieth day of January, 1883, said Benjamin B. Fay took from the assets of the said firm and fraudulently appropriated to his own use, five hundred and sixty-six dollars ($566); that on the same day the—Lucius W. Conkey took from the assets of said firm and fraudulently appropriatad to his own use, five hundred and sixty-six dollars ($566); that on the twenty-first and twenty-second days of January, 1883, the said Julius K. Graves fraudulently appropriated to his own use drafts and checks belonging to the said limited partnership amounting to two thousand seven hundred and forty-one dollars and thirty-eight cents ($2,741.38); that on the twenty-second day of January, 1882, the said Benjamin B. Fay took from the assets of said partnership and fraudulently appropriated to his own use the further sum of four hundred and forty-eight dollars and forty eight cents ($448.48); that said Lucius W. Conkey on the day last above named, took from the assets of said firm and fraudulently appropriated to his own use the further sum of seven hundred and seventy-three dollars and forty-eight cents ($773.48); that on January twenty-second and twenty-third, 1883, after the levy of the executions aforesaid, said firm of Flower, Remy & Gregory collected drafts and checks belonging to said limited partnership amounting to nineteen hundred and twenty-seven dollars and ninety-six cents ($1,927.96), which they now hold; that the said judgments in favor of the Dubuque County Bank, The Commercial National Bank, and the Importers and Traders National Bank of New York were confessed at the special instance of the said Graves; that the said judgment in favor of the said Commercial National Bank was not an indebtedness due from said limited partnership to said bank, and that the said Graves owes the said limited partnership a sum equal to the assets of the said

limited partnership which has been applied by his direction in payment of the three last named judgments; that the suit by creditors' bill in this court wherein said Commercial National Bank, Julius K. Graves, the said Dubuque County Bank, and said Importers and Traders National Bank were plaintiffs and Benjamin B. Fay and Lucius W. Conkey were defendants, the said Bradford Hancock, receiver, and with the funds in his hands as such, on and prior to March 26, 1883, paid on said last three named judgments, as follows:

To the said Commercial National Bank, fourteen thousand three hundred, and ninety-six dollars and forty-nine cents ($14,396.49).

To the said Dubuque County Bank, twelve thousand two dollars and thirty-eight cents ($12,002.38).

To the said Importers and Traders National Bank, fifteen thousand one hundred and twenty-six dollars and eighty-one cents ($15.126.81).

And to the said Julius K. Graves upon the said judgment in his favor in this court, twenty-seven thousand two hundred and thirty-two dollars and fifty cents ($27,232.50).

The court further finds that in a certain other suit by creditors' bill in this court, wherein The Bay State Sugar Refining Company, Alvin F. Shumway, Martha J. Fay, The First National Bank of Westboro, Massachusetts; Hiram A. Sheldon, Walter Potter, and Addison B. Robinson are plaintiffs and the said Benjamin B. Fay and Lucius W. Conkey are defendants, in which the said Hancock was also appointed receiver he paid out of the assets in his hands as such the following sums of money:

To the Bay State Sugar Refining Company on its said judgment two thousand dollars ($2,000).

To the said Bay State Sugar Refining Company on the said judgment in favor of Alvin F. Sumway, thirteen hundred and ninety,eight dollars ($1,398); to Hiram A. Sheldon on the said judgment in his favor, eleven hundred dollars ($1,100); to Martha J. Fay on the said judgment in her favor, seven hundred and forty dollars ($740); to Addison B. Robinson on the said judgment in his favor, two hundred and twenty dollars ($220); to the First National Bank, of Westboro on the said judgment in its favor, twenty-four hundred dollars ($2,400.00); to Walter Potter on the said judgment in his favor, eight hundred and sixty dollars ($860).

The court further finds that the two creditors' bills above mentioned brought in this court against Benjamin B. Fay and Lucius W. Conkey, in the first of which The Commercial National Bank of Dubuque and others were complainants and in the second of which The Bay State Sugar Refining Company and others were complainants, were each brought and prosecuted with the intention of defrauding the creditors of the said limited partnership of their just rights; that the said Fay and Conkey consented to the filing of the said bills and to the appointment of a receiver under the same.

The court further finds that the complainant, Chester C. Corbin, is the owner and holder of the two promissory notes described in the said bill of complaint, and that the said limited partnership is indebted to him thereon in the sum of four thousand three hundred and fifty-nine dollars and thirty-one cents ($4,359.31).

It is therefore ordered, adjudged and decreed, that all the property and effects held by the said limited partnership on the twentieth day of August 1882, and subsequent thereto, and when the said judgments were confessed, were a special trust fund for the payment of the firm debts ratably among its creditors.

It is further ordered, adjudged and decreed that the defendant, Julius K. Graves, pay to the clerk of this court within thirty (30) days from the entry of this decree, for the benefit of the complainant, Chester C. Corbin, and for such other creditors of the said limited partnership as shall prove their right to share in the distribution of the assets of said firm, the sum of one hundred thousand seven hundred and ninety-six dollars and seventy-one cents ($100,796.71), being the amount of the several sums paid to him out of the assets of the said limited partnership, and the sum paid to the said Commercial National Bank of Dubuque, and the sum paid to the said Dubuque County Bank, and the sum paid to the said Importers and Traders National Bank out of said assets, with interest thereon at six per cent. from the date of each payment, respectively.

It is further ordered, adjudged and decreed that the defendants, James M. Flower, Curtis H. Remy and Stephen S. Gregory, pay to the clerk of this court within thirty (30) days from the entry of this decree, for the benefit of the complainant, Charles C. Corbin, and such other creditors of the said limited partnership as shall prove their right to share in the distribution of the assets of said firm, the sum of eight thousand five hundred and fifty-nine dollars and eighty cents ($8,559.80), with interest at six per cent. from April fourteenth, 1883, together amounting to the sum of nine thousand eight hundred and eighty-six dollars and fifty-seven cents ($9,886.57).

It is further ordered, adjudged and decreed that the defendant, Benjamin B. Fay, pay to the clerk of this court within thirty (30) days from the entry of this decree, for the benefit of the complainant, Chester C. Corbin, and such other creditors of the said limited partnership as shall prove their right to share in the distribution of the assets of said firm, the sum of ten hundred and fourteen dollars and forty-eight cents ($1,014.48), with interest at six per cent from March first, 1883, together amounting to the sum of eleven hundred and seventy-six dollars and twelve cents ($1,176.12).

It is further ordered, adjudged and decreed that the defendant, Lucius W. Conkey, pay to the clerk of this court within thirty (30) days from the entry of this decree, for the benefit of the complainant, Chester C. Corbin, and

such other creditors of the said limited partnership as shall prove their right to share in the distribution of the assets of said firm, the sum of thirteen hundred and thirty-nine dollars and forty-eight cents ($1,339.48), with interest at six per cent. from March first, 1883, together amounting to the sum of fifteen hundred and fifty-two dollars and eighty cents ($1,552 80).

It is further ordered, adjudged and decreed that if said defendants, or either of them, fail to pay to the clerk of this court the several sums herein decreed to be paid by them respectively within the time specified, that execution do issue therefor against the property of such defendant or defendants, respectively.

It is further ordered, adjudged and decreed that a reference be made to E. B. Sherman, one of the masters of this court, to take proof of the debts due to such of the creditors of the said limited partnership as shall apply to him for that purpose, and that the said master take and report to this court all the testimony adduced in favor of or against the allowance of such debts, and his findings thereon, and that such creditors present their claims and the testimony in support thereof before said master within forty days from the entry of this decree, and that said master immediately give notice to said creditors, by publication at least ten (10) days in some newspaper of general circulation-published in Chicago, to appear before him and present and prove their claims within the time aforesaid. It is further ordered that it be referred to said master to take proof of the costs and expenses paid or incurred by the complainant in the prosecution of this suit, and the value of the services of each of the solicitors who have rendered service therein on behalf of said complainant, and report the same, with his findings thereon, to this court with all convenient speed. It is further ordered, adjudged, and decreed that the said Bradford Hancock, within five days from the entry of this decree, deliver to Robert E. Jenkins, receiver herein, all books of account, papers, letters, choses in action, and personal property which came into his hands while acting as receiver in the suits aforesaid, and that within said time he pay to the clerk of this court all moneys in his hands, possession, or control as such receiver, and that he attend upon this court and settle his account as such receiver without delay.

It is further ordered, adjudged and decreed, that the said defendant, Julius K. Graves, Benjamin B. Fay, and Lucius W. Conkey, pay the costs of this cause, to be taxed by the clerk of this court, and the court doth reserve all matters not herein decreed upon, including the right to decree against the creditors in whose favor said judgments were confessed, for further direction and decree, and leave is given the complainant to apply at the foot of this decree for such further order as may be necessary to the due execution thereof or may be required in relation to any matter not finally determined by it; and thereupon the defendant, Julius K. Graves, by Messrs. Flower, Remy &

Gregory, his solicitors, pray an appeal to the Supreme court of the United States, which is allowed by the court upon said defendant filing his bond, to the approval of the court, in the sum of one thousand dollars, and Messrs. Flower, Remy amd Gregory appear also, by J. M. Flowers, Esq., their solicitor, and separately pray an appeal to said Supreme court, which the court, allows upon their filing a bond, to the approval of the court, in the sum of twelve thousand—, both of said bonds to be filed within thirty days.

Opinion by Judge Gresham, filed April 23, 1888.

Circuit Court of the United States, Northern District of Illinois

Chester C. Corbin
v.
William A. Boies *et al.*

Gresham, J.:

On March 30, 1882, William A. Boies, Benjamin B. Fay, Lucius W. Conkey and Julius K. Graves formed a limited partnership, under the firm name of Boies, Fay & Conkey, to carry on the business of wholesale grocers for five years, at Chicago. Graves, a special partner only, was a resident of Dubuque, Iowa, where he remained, and, whether the business proved profitable or unprofitable, interest was to be paid on his capital of $50,000 at twenty per cent. per annum. Fay and Graves were brothers-in-law, and the former became financial and chief manager of the firm. In August, 1882, about five months after Graves became a limited partner, an inventory was taken of the assets, from which the book-keeper made a statement showing the firm's financial condition. This statement embraced all the bills receivable, and, although some of the debts due to the firm were then uncollectible and worthless, no deduction was made on that account.

If such deduction had been made it would have appeared that the liabilities exceeded the assets. If the partners did not then know that the firm was insolvent, they must have known it was seriously threatened with insolvency and bankruptcy. This statement has not been produced, and Fay testified that a copy of it which was furnished him by the book-keeper had been lost or destroyed.

The Illinois statute under which this limited partnership was formed, provided that it shall not be lawful for any such firm or any member thereof, in contemplation of bankruptcy or insolvency, and with the intention of preferring or securing one or more creditirs, to the exclusion of others, to make any sale, transfer or assignment of their property or effects, or to confess any judgment or to create any lien on the property or assets, and that all preferences so made shall be utterly void. Instead of suspending business in Au-

gust, 1882, and holding the assets as a special trust fund for the payment of its debts ratably amongst its creditors, as the firm should have done, it continued in business. Graves came to Chicago and assumed Fay's duties as financial manager, that the latter might go east to buy more goods on the firm's credit. During the four or six weeks that Graves thus remained in the store he had access to and examined the private ledger and other books and papers, which disclosed the firm's condition.

An account was kept with the First National Bank of Chicago, of which L. J. Gage was vice-president and general manager. In September, during Fay's absence, Graves called at the bank and told Gage that he would be personally responsible for all checks drawn by the firm's cashier during Fay's absence, and when the latter returned he assured Gage that should the firm have trouble, the bank would be protected.

The Commercial National Bank of Dubuque, of which Graves was a director, kept an account with the First National Bank of Chicago, and Graves and Gage had a personal acquaintance, if they were not personal friends. The evidence shows that in September, after Graves had promised that all the firm's checks should be paid, the bank permitted the firm to overdraw its account. On the 14th of October the firm needed money to pay an overdraft at the bank and to meet paper which would soon become due, and Gage accommodated the firm with a demand loan for $10,000, for which amount he took the judgment note of the partners, with warehouse receipts for merchandise recently bought on the firm's credit as collateral security. It is claimed that three days later, October 17th, the four partners signed an agreement dissolving the limited partnership, and that two days still later Boies sold his interest in the firm to Fay and Conkey, on which day Boies, Fay & Conkey, Graves having retired two days before, signed the following agreement: "It is hereby stipulated and agreed by and between the parties hereto, that the partnership heretofore existing between William A. Boies, Benjamin B. Fay and Lucius W. Conkey, under the firm name of Boies, Fay & Conkey, is this day dissolved by mutual consent.

The said dissolution shall date from the first day of November, 1882, and legal notice thereof published on or before the 10th day of November, 1882."

This paper or notice was published for the first time in the Chicago Daily Evening Journal on December 2, 1882, and the paper by which it is claimed the limited partnership was dissolved two days before, was published on the same day in the Chicago Legal News, a legal publication read by few besides lawyers. On the 18th of October, the day after the alleged dissolution of the limited partnership, the bank through Gage, made another demand loan of $10,000 to the limited partnership, receiving as security other warehouse receipts of the same character. At the time of the alleged dissolution of the limited partnership and the sale by Boies of his interest to Fay and Conkey, a

large amount of the limited partnership paper was about to mature, and the firm was siill purchasing goods, and the testimony shows that the partners deemed it unwise to then give notice of the alleged withdrawal of Graves and Boies. The business was continued in the name of the limited partnership, with Graves' knowledge, and checks were signed in the firm name until December 2d. From October 5th to December 6th the overdrafts ranged from $557 to $10,126, and from December 4th to December 16th the bank paid checks drawn in the name of the limited partnership, payable to Graves, amounting to a large sum, and up to December 6th, at least, charged such payment to the account of Boies, Fay & Conkey. The goods which were pledged to the bank were part of the purchase made by Fay after the firm had become insolvent, and they were hauled direct from the freight depot to the warehouse, instead of to the store or warehouse of the firm.

On December 8th the bank, through Gage, made demand loan of $8,000 to Fay & Conkey, taking in pledge therefor part of the new goods bought in the name of the limited partnership. A note of Boies, Fay & Conkey, payable to Graves, for $5,000, was protested at Dubuque on the 14th of December and sent to the First National Bank of Chicago for collection, and on January 20, 1883, Gage, for the bank, discounted customers' notes for Fay & Conkey amounting to $3,459, and on the same day, with the firm's money, Graves paid the bank, through Gage, two notes of the limited partnership for $5,000 each, due in seven and nine days, respectively, before maturity, the bank then holding, with the knowledge of Gage, a $5,000 note of Fay & Conkey, indorsed by Graves, and payable two days later, and also other notes of Fay & Conkey, unindorsed and unsecured, for more than this amount. It will thus be seen that paper of the limited partnership, which was not then due for seven and nine days, was paid in preference to a note of Fay & Conkey, on which Graves was liable as indorser, as well as unsecured notes of Fay & Conkey.

This payment was made after it had been determined that the firm should suspend and prefer part of its creditors, and on the same day Graves, Fay & Conkey went to the office of Flower, Remy & Gregory for legal advice, which firm then was and for some time had been the general counsel of the bank and of the insolvent firm. During the consultation which occurred with Mr. Remy he visited the bank, and on his return stated that Gage would be satisfied with a judgment in favor of the bank for $40,000; for which amount a judgment note was accordingly prepared and signed by Fay and Conkey.

It was thought that, with the warehouse receipts and the customers' discounted notes, this would amply secure the bank.

Two judgment notes, one for $17,500 and the other for 27,000, were also executed by Fay and Conkey at the same time and place, payable to Graves; and it was agreed between Graves, Gage and Remy that when the judgments

were confessed, including 5 per cent. for attorneys' fees, executions should immediately issue, and that the bank's execution should be first levied, and that Graves' execution for $17,500 should be next levied, so that the bank and Graves might have liens prior to all other creditors. Before leaving the store on the evening of the same day Fay and Conkey divided the firm money on hand, each receiving $566, and the next morning (Sunday) the same parties again met by appointment at the office of Flower, Remy & Gregory, where the book-keeper and cashier brought the firm's mail, which contained drafts amounting to $2,215.38. These drafts were endorsed and delivered to Graves. At this interview Remy appears to have prepared notes upon which judgments were to be confessed in favor of other creditors. The mail brought to the firm on Monday morning about $1,300, which was divided between Fay and Conkey and Graves, after which judgments were confessed in one of the state courts and in this court in favor of the bank, Graves, and other creditors on the judgment notes previously executed, amounting in the aggregate to $233,709.09, of which $10,658.65 represented attorneys' fees. Executions were immediately issued on the state court judgments and handed to Remy, who delivered them to the sheriff of Cook county in such order as to secure to the bank the first lien and Graves the second. These executions were levied upon the entire stock of merchandise of the firm and the proceeds of the sale paid the bank's judgment in full and something less than $10,000 on the Graves $17,500 judgment.

The executions which were issued upon the judgments confessed in this court in favor of Graves, the Commercial National Bank of Dubuque, the Dubuque County Bank, and the Importers and Traders National Bank were the same day returned *nulla bona*, and these parties joined in a creditors' bill against Fay and Conkey, with whose consent, on the following day, Bradford Hancock was appointed receiver. Hancock immediately qualified and took possession of the firm's office, books, and bills receivable without interfering with the sheriff's possession.

On the 1st of March following Chester C. Corbin, an unpreferred creditor of the limited partnership, for himself and such other creditors as might be willing to unite with him, commenced this suit against all the parties in whose favor judgments had been confessed for the purpose of setting them aside and having the assets of the insolvent limited partnership equally divided among the creditors.

On March 31, 1883, a *subpœna duces tecum* was served upon Hancock, the receiver, to appear on April 4th before the examiner with the books of the firm and testify as a witness; and the evidence shows that after the service of this subpœna and before the 4th day of April he sold as old paper all letter-press copy books except one, the bank books, check books, and checks back of November, 1882, the cash-book balance statements, and bills-payable book

prior to July, and other books which were regarded as important by the expert book-keeper. This fact is all the more significant, as Flower, Remy & Gregory were also the receiver's counsel.

Why was it thought necessary to dissolve the limited partnership on the 17th of October and keep the fact a secret from the public until the 2d of December? And if there was no intention on the part of Graves and his partners to take advantage of any portion of their creditors and to allow Graves to escape liability as a partner, why was the agreement of dissolution published in the Chicago Legal News, a legal publication read by few except lawyers, instead of in the Evening Journal, a paper of much wider general circulation? And why did the notice which appeared in the Evening Journal of the same day say nothing about the retirement of Graves?

What occurred prior and subsequent to October 17th, fairly shows that the dissolution was a pretended one, and that the form was gone through for the purpose of having Fay and Conkey, as general partners, confess judgments, as they did, to protect Graves against his liability as special partner and as indorser of the firm's paper. Prior to the secret dissolution of the limited partnership the firm had placed in the hands of brokers in Chicago, New York, and Boston its commercial paper for sale on the market, and three days before the same time the firm had pledged to the First National Bank goods bought by Fay on the credit of the insolvent firm as collateral security for a demand loan of $10,000, and on the day following the secret dissolution they made another pledge of merchandise, purchased in the same way, as security for another demand loan of the same amount.

Between the time of the secret dissolution and the 2d of December a still larger amount of the firm's commercial paper was put upon the market for discount, and during the same time the firm was unable to pay its employes, its rent, and bills for current purchases in Chicago. The substitution of a large amount of the notes of Fay and Conkey for notes of Boies, Fay & Conkey furnishes still further evidence of a previously-formed purpose to enable Fay and Conkey, as general partners, to confess judgment by way of preferences, and thus shield Graves. The judgment confessed in favor of the Commercial National Bank of Dubuque represented, in part, four notes of $2,500 each, drawn by Fay and Conkey in favor of Graves for his accommodation. These notes did not represent an indebtedness of the firm, and yet Graves caused them to be treated as part of the firm's indebtedness, and that amount was paid out of the assets of the limited partnership. This was not done through inadvertence or mistake, for Graves knew the facts, and in the argument his counsel admitted that this—.

This, the Corbin suit, came to a final hearing on November 17, 1885, when the court decreed that on the 20th of August, 1882, the limited partnership was insolvent with the knowledge of each of the partners and so continued

until the termination of its business on the 22d of January, 1883, when Fay and Conkey, the pretended successors of Boies, Fay & Conkey, confessed the judgment already mentioned; that the acts of the partners, whereby they pretended to dissolve the limited partnership, were done with intent to defeat and evade the provisions of the statute of Illinois which prohibited preferences by such partnerships, and that all such acts were void; that the judgments were confessed by Fay and Conkey for the purpose of protecting Graves against loss as a member of the limited partnership and as an endorser for it; that the judgments in favor of the Commercial National Bank for $14,396.49, the Dubuque County Bank for $12,002.38, the Importers and Traders National Bank of New York for $15,126, were confessed at the special instance of Graves, and that they, as well as the Graves judgment in this court, in all amounting to $68,758.24, were paid in full out of the equitable assets of the limited partnership; that Graves also received out of the assets of the limited partnership, $9,781.18, on the judgment confessed in his favor in the State court, $5,900, as profits, although the firm made no profits, and $2,741.38 being the amount taken by him on Sunday and Monday, January 22d and 23d. Graves was required by this decree to pay into court for the benefit of the creditors of the limited partnership, within thirty day, $100,796.71, which was the amount so received by him or for his benefit, with six per cent. interest thereon from the date of payment.

Flower, Remy & Gregory received, upon the several confessed judgments, as attorneys' fees, $8,559.80 for which amount the court also entered a decree against them, with interest thereon at 6 per cent., the total decree being $9,886.57, which they were also required to pay to the clerk of the court within thirty days, for the benefit of the creditors of the limited partnership, it being thought that these sums would be sufficient to pay the claims of the unpreferred creditors, and the court reserved the right to thereafter decree against the First National Bank of Chicago or as the proof might justify.

At and before the hearing Graves, represented by Flower, Remy & Gregory, *and* not paying the decree within the time limited, an execution was issued against him and returned *nulla bona*, after which an *alias* execution was issued, upon which the marshal endorsed a return that he had made a personal demand upon Graves for money or property to pay or satisfy the same and he had refused to do either.

An order was then entered on the application of the complainant requiring Graves to personally appear before the court on October 30, 1886, and show cause why he should not be attached for contempt in failing to comply with the decree of the court. This he did not do, although personally served with a copy of the order. On November 1, 1886, it was adjudged that Graves had wilfully disobeyed the orders of the court, that he was guilty of contempt of its authority, and that a writ be directed to the marshal of the Northern

district of Illinois commanding him to arrest Graves and commit him to jail of Cook county until he complied with the orders of the court or was discharged by due process of law. Not finding Graves within his district, the marshal proceeded to Dubuque, where Graves resided, and then presented the writ to the district judge of the Northern district of Iowa and requested that the proper process should be issued for his arrest and identification in order that he might be removed to this district. His request was denied, after argument of counsel.

(*In re* Graves, 29 Fed. Rep., 60.)

The jurisdiction of this court, both as to subject-matter and the parties, including Graves, is not denied, and until the decree and orders are reversed they are binding upon him. When Graves refused to obey the orders and process of this court, and thus defied its authority, he was rightfully adjudged guilty of contemrt. Section 725, Rev. Stats., declares that the courts of the United States shall have power to punish, by fine or imprisonment, persons guilty of contempt of their authority by disobedience to any lawful writ, process, order, rule, decree or command. By his wilful disobedience of the orders and process of the court, Graves committed an offense against the United States for which he stands convicted and sentenced, and he is no more entitled to immunity in another jurisdiction than if he had escaped after conviction and sentence for a felony.

In Wartman *vs.* Wartman, Campbell's Report, 262, Chief Justice TANEY says:

"Disobedience to the legitimate authority of the court is by law a contempt, unless the party can show sufficient cause to excuse him."

In speaking of this offense, in Fanshaw *vs.* Tracy, 4 Biss., 497, Judge DRUMMOND says:

"It is not a crime in one sense, but it partakes of the nature and character of a crime, and I do not see why if a man is imprisoned for a contempt of a court of the United States and breaks jail and escapes into another state he cannot be arrested and returned to his imprisonment under the authority of the United States."

In New Orleans *vs.* Steamship Company, 20 Wall., 392, Justice SWAYNE says:

"Contempt of court is a specific criminal offense."

On this subject see also *In re* Charles, 22 Wall., 157.

Graves should have paid into court the amount adjudged to be due from him, if he was able to do so, and if he was insolvent or unable to satisfy the decree he could and should have exonerated himself by personally appearing and showing that fact.

It cannot be that the law is so impotent as to allow a party to resist a suit, step by step, and when a decree is entered against him disobey it with impunity by removing beyond the court's territorial jurisdiction.

Graves having thus, for the time being at least, successfully defied the authority of the court, the complainant now asks for a decree against the First National Bank of Chicago for the $40,000 paid to it in satisfaction of the confessed judgment, and also for $10,000 of firm assets paid to it on January 20th, with interest on these amounts. This relief is asked on the ground that the limited partnership became insolvent as already stated, and, knowing that fact, the bank, through Gage, co-operated with Graves in his scheme, which had for its object the latter's protection against liability as special partner and as indorser.

$10,000 was the debt of Graves and not the debt of the firm. The judgment confessed at Graves' instance in favor of the Dubuque County Bank exceeded the indebtedness of the firm to that bank by about $3,000. The bank declined to receive more than the amount of its debt and Graves collected and retained the excess. These circumstances are damaging to Mr. Graves' integrity.

Graves needed the aid of the bank to accomplish his purpose and it co-operated with him through Gage. The bank was apparently willing, if not desirous that Graves should be protected against threatened loss, provided it did not suffer thereby. Gage testified that it was not until after the judgments had been confessed that he knew a limited partnership could not prefer one or more creditors to the exclusion of others.

We have already seen that while Fay was absent buying goods and Graves was occupying his place in the store the latter told Gage he would see that all checks drawn by the firm's book-keeper were paid; that when Fay returned he promised Gage that if the firm got into trouble the bank should be protected, and that two days before the judgments were confessed it was agreed between Graves and Gage, and Fay & Conkey, in the office of Flower, Remy & Gregory, who acted as counsel for all the parties, that the bank's judgment and execution should be a first lien and first paid, and that Graves' judgment should stand next in priority. After the proceeds of the sale had been paid to the bank and Graves, nothing was left from this source for other creditors, nor was it expected that anything would be.

On December 28th the bank, through Gage, accepted an unindorsed and unsecured note of Fay & Conkey in renewal of a note of the limited partnership, due on that day.

On December 29th the bank, through Gage, accepted another unsecured note of Fay & Conkey for $5,000 in renewal of a note of the limited partnership for the same amount, due the same day. On December 30th the bank, through Gage, accepted an unsecured note of Fay & Conkey of $5,000, in renewal of a note of the limited partnership dated October 23d and payable sixty-five days after date. On January 9, 1883, the bank, through Gage, discounted an unsecured note of Fay & Conkey for $5,000 and paid to Graves $1,900 of

the proceeds on a check of Fay & Conkey, and applied the residue in payment of debts of the limited partnership and in satisfaction of an overdraft of Fay & Conkey. On January 10th the bank, through Gage, discounted another unsecured note of Fay & Conkey for the same amount, and on the same day paid to Graves two checks drawn by Fay & Conkey in his favor for $2,500 each.

The testimony, including that of Gage, fairly shows that he doubted the solvency of Fay & Conkey as early as December 28th, when he accepted the first of their unsecured notes in exchange for a note of the limited partnership for a like amount, and thus released Graves from liability. This conduct of Gage is strong evidence in itself that he had been made acquainted with some plan for the protection of Graves at the expense of the creditors of the limited partnership, and that something had been done or promised upon the faith of which the bank was willing to take unsecured paper of two men not entitled to credit in renewal of paper of the limited partnership. The firm had lost money from the time it commenced business, and after the inventory was taken in August, if not before, it was slow in meeting its payments. Its account was repeatedly overdrawn at the bank both before and after Graves' alleged withdrawal. Remy wrote the dissolution contracts and Flower, Remy & Gregory were the general counsel of the firm, made collections for it, and from time to time gave the partners legal advice. It does not appear from the testimony that the members of the limited partnership had any reason for keeping their counsel ignorant of the firm's condition and purposes or of Graves' retirement as a partner. It was known to the members of the limited partnership and to the bank that Flower, Remy & Gregory were counsel for both; and it is not unfair to assume, as I do, that any information that the counsel had of the condition and purposes of the insolvent firm which it was material for the bank to know was communicated to Gage.

If the counsel knew that the limited partnership was insolvent or threatened with insolvency, as I think they did, and that it had been dissolved, and did not communicate that information to the bank, they were unfaithful to it. The mere fact that Flower, Remy & Gregory continued to maintain the relation of counsel to the limited partnership as well as its alleged successor, and also to the bank, indicates that the latter knew the financial condition of the former and that there was co-operation between them; but even if the bank in good faith continued to deal with the limited partnership, and afterwards with Fay & Conkey as the successors of it, without knowledge of anything indicating insolvency or threatened insolvency on the part of either, and that Graves had ceased to be a special partner, the bank was bound by the knowledge which its counsel had upon these subjects. A decree will be entered against the bank for the amount it received in satisfaction of the judgment confessed in its favor, with interest.

Endorsed: Filed April 23, 1888. WM. H. BRADLEY, *Clerk.*

DECREE AGAINST FIRST NATIONAL BANK OF CHICAGO.

Chester C. Corbin
vs.
William A. Boies *et al.* } *In Chancery.*

The motion of the complainant for decree against the First National Bank of Chicago having been duly considered, the court further finds that upon the judgment for forty thousand dollars ($40,000) confessed on the twenty-second day of January, 1883, by Fay & Conkey, as successors of the limited partnership, the defendant, The First National Bank of Chicago, on or about February 26, 1883, received out of the sale of the assets of the limited partnership from the sheriff, on an execution in favor of said bank, thirty-eight thousand seven hundred and eight dollars and thirty-five cents ($38,708.35); that at the time of the pretended dissolution of the limited partnership, in October, 1882, and on the second day of December, 1882, and later, the defendant, The First National Bank of Chicago, knew said limited partnership was insolvent and unable to pay all its creditors; that said bank knew that the contract of dissolution of the limited partnership was a pretended one and entered into for the purpose of protecting the limited partner, Julius K. Graves, from liability as such and as endorser for the firm, and that the bank co-operated with the members of the limited partnership for the accomplishment of such purpose; and the court further finds that for the purpose aforesaid and to obtain an illegal preference over other creditors of the limited partnership, the judgment was confessed by Fay & Conkey in favor of the bank. It is therefore ordered, adjudged, and decreed that the defendant, The First National Bank of Chicago Illinois, pay to Robert E. Jenkins, receiver herein, within thirty days from the entry of this decree, the sum of fifty thousand, seven hundred and twenty-one dollars and ninety-five cents ($50,721.95), being the sum so illegally received, by said bank, with interest thereon at six per cent. from February 26, 1883, and if said sum be not paid within said time that execution be issued therefor against the property of said bank; and thereupon the defendant, The First National Bank, prays an appeal to the Supreme Court of the United States, which is allowed upon said bank filing its bond, with approved securities, in the sum of sixty thousand dollars ($60,000.)

Statement of the Case.

and reference to some of the testimony in support of the findings and decrees of the court below:

For about ten years prior to 1880, the firm of Boies, Fay & Conkey was engaged in business as wholesale grocers in the city of Chicago. The firm during all that time being composed of Henry M. Boies (the father of William A. Boies), Benjamin B. Fay, and Lucius W. Conkey. Under their partnership agreement, the profits and losses of the firm were shared as follows: Boies, forty-two per cent.; Fay, thirty-three per cent., and Conkey twenty-five per cent. During the month of October, 1880, Henry M. Boies died (Graves' Rec., 266), and bequeathed to his son, William A., his interest in said firm; which interest the firm's private ledger shows was twenty-four thousand two hundred and seventy-two dollars and ninety-one cents ($24,272.91). (Graves' Rec., 266–7). On January 1, 1881, an inventory and accounting was taken of the firm's assets and liabilities, when it was found that the firm's losses during the year ending December 31, 1880, amounted to $17,245.88, which sum was charged in the firm's private ledger to the accounts of the several partners, as follows:

To the account of William A. Boies, as successor to Henry M. Boies.....$7,243.27
To the account of Fay..... 5,691.14
To the account of Conkey..... 4,311.47

(Graves' Rec., 454.) After taking this inventory on January 1, 1881, a new partnership agreement was then entered into between the son William A. Boies and Mr. Fay and Mr.

Conkey, under which agreement the new firm's profits or losses were to be shared between the partners as follows: William A. Boies—thirty-three per cent., Fay, forty-two per cent., and Conkey, twenty-five per cent. During the year 1881, this new firm, under the general management of Mr. Fay, largely increased the amount of the firm's sales, but in doing so, sold large quantities of goods on credit to a good many irresponsible retail merchants throughout the northwest, so that by January 1, 1882, the stale and uncollectible debts then owing to the firm amounted to over $50,000. In addition to the loss incurred by such sales on credit, the firm lost on merchandise, etc., during the year ending December 31, 1881, $13,692.09. (Graves' Rec., 453.) The result of the year's business was so unsatisfactory that the partners decided not to enter the annual balance sheet showing such losses on their books of account, and by mutual agreement they carried along on their books as good assets, the $50,000 of uncollectible debts due to them, when, in fact, they were nearly worthless. Notwithstanding this unfavorable financial showing, the firm still being under the management of Mr. Fay, launched forth in business heavier than ever before, and some time during March, 1882, being crippled in their credit, they conceived the idea of bolstering it up by changing their firm from a general to a limited partnership, and by taking into the firm as a special partner, the appellant, Julius K. Graves (a brother-in-law of Fay), who at that time was reputed to be very wealthy, and was an endorser on the firm's paper to the amount of over $50,000 (Graves' Rec., 308), and who, in addition to his liability as such endorser, was creditor of the firm to the amount of $50,000, for which sum so due to him, he held six promissory notes of Boies, Fay & Conkey. (Graves' Rec., 265), all dated March 20, 1882 (only ten days before the limited partnership was formed),

and to fall due and payable as follows: One note for $5,000, payable in thirty days, one note for $5,000, in two months; one note for $5,000, in three months; one note for $5,000, in four months; one note for $5,000, in five months; and one note for $25,000, in six months.

On the question of J. K. Graves being endorser for the firm Mr. Fay testified as follows:

Q. (By Mr. Manning to Mr. Fay, Graves' Rec., 308): According to your best judgment, how much of your paper was he (J. K. Graves) endorser on at the time he went in as special partner in March, 1882? A. Well, I should think over $50,000.

At the time this special partnership was formed, no inventory or accounting was taken by the firm, but Mr. Fay says (Bank Rec., 102):

He (Graves) had full access to all the books and looked over the books.

Again (Bank Rec., 105), Mr. Fay says:

I don't recollect all I told Mr. Graves, but I told him so far as I knew any thing about the business, and I made him acquainted with the business in every respect, so far as I was able to. I will say this, that I never concealed anything from him, in regard to the business.

Mr. Vaughan says (Graves' Rec., 393), on January 1, 1882, the merchandise on hand, amounted to $212,313.70. The limited partnership agreement between Boies, Fay & Conkey as general partners, and Julius K. Graves as special partner is as follows (Graves, Rec., 793):

Limited Partnership Agreement.

This is to certify that the undersigned has formed a limited partnership in accordance with the laws of the State of Illinois, and that in pursuance thereof, we do make the following certificate:

1st. The name and style of the said partnership and firm under which the business thereof shall be done is Boies, Fay & Conkey.

2d. The business of the said partnership to be conducted and prosecuted by it is to be that of wholesale grocers and importers, and such other business as may be incidentally connected therewith.

3d. The names of the general partners in the said partnership are William A. Boies, who is a resident of Evanston in the State of Illinois; Benjamin B. Fay, who is a resident of the city of Chicago in the State of Illinois; and Lucius W. Conkey, who is a resident of Evanston in the State of Illinois; and the name of the special partner is Julius K. Graves, who is a resident of the city of Dubuque in the State of Iowa.

4th. The amount of capital stock which the said special partner has contributed to the said partnership is the sum of fifty thousand dollars $50,000.

5th. The said partnership is to commence on the 30th day of March, A. D. 1882, and is to terminate on the 30th day of March, A. D. 1887.

6th. In the event of the death of any of the said partners, the copartnership shall continue until the 1st day of January, next thereafter, unless otherwise agreed by and between the surviving partners and the legal representatives of the deceased partner.

WITNESS our hands and seals.

WILLIAM A. BOIES, [SEAL.]
BENJAMIN B. FAY, [SEAL.]
LUCIUS W. CONKEY, [SEAL.]
JULIUS K. GRAVES, [SEAL.]

Dated at Chicago, Illinois, March 30, A. D. 1882.

"STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, J. Edwards Fay, a notary public in and for the said county in the state aforesaid, do hereby certify that William A. Boies, Benjamin B. Fay, Lucius W. Conkey and Julius K. Graves, who are personally known to me to be the same persons whose names are subscribed to the foregoing certificate, appeared before me this day in person and severally acknowledged that they signed, sealed and delivered the said certificate as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 30th day of March, A. D. 1882.

[SEAL.] J. EDWARDS FAY,
Notary Public."

"STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

Benjamin B. Fay, being duly sworn, deposes and says that he is one of the general partners in the limited partnership and firm of Boies, Fay & Conkey. And deponent further says, that the amount of fifty thousand ($50,000) dollars stated in the certificate of said partnership to have been contributed to the capital stock thereof by the said special partner, has been actually contributed and applied and paid in to the same.

BENJAMIN B. FAY.

Subscribed and sworn to before me this 30th day of March, A. D. 1882.

[SEAL.] J. EDWARDS FAY,
Notary Public."

Secret Verbal Agreement.

On March 30, 1882, when the special partnership was formed, the three general partners fraudulently entered into a secret verbal agreement with the special partner (Graves) to the effect that he (Graves) should be paid by, and allowed to draw from the firm, $10,000 per annum as his share of the firm profits for the use of his special capital, whether the firm made or lost money in its business. Mr. Boies says (Graves' Rec., 268):

> He (Graves) was to have $10,000 a year for the use of his money whether the firm made or lost money.

Mr. Fay says (Graves' Rec., 276):

> We had an arrangement in writing with Graves about his share of the profits, but that at the time of giving his deposition (September 13, 1883), he could not say positively whether there was a copy in existence.

Again (Graves' Rec., 279), Mr. Fay says:

> "I think the substance of the arrangement with Mr. Graves was similar to that stated by Boies."

Again (Graves' Rec., 318), (on September 25, 1883), Mr. Fay says:

> "I have not succeeded in finding the agreement made with Mr. Graves, but the understanding between the firm and him was that he (Graves) was to have $5,000 each six months for his share of profits whether the firm made or lost money, and that he was paid by the firm in goods shipped Raymond & Kingman, $5,000 for the first six months under that agreement."

Mr. Conkey says (Graves' Rec., 923):

> Mr. Graves was to have $10,000 a year regardless of whether the firm made or lost money.

Julius K. Graves says (Graves' Rec., 1,046) in substance:

> His recollection is, that he was settled with by the firm from the time he went in as a special partner up to October 30, 1882, at the rate of $10,000 per annum as his share of firm profits.

The whole testimony on this point shows that Mr. Graves

was paid under that agreement $6,666.66, as follows: $5,900 in goods shipped Raymond & Kingman, and $766.66 in a note of the firm, dated December 4, 1882, which was paid, making the total amount $6,666.66 actually received by Mr. Graves under this unlawful agreement with his firm. In view of the fact that this $6,666.66 is exactly the amount Mr. Graves would be entitled to receive from the firm for eight months, and the further fact that the $766.66 note is dated December 4, 1882, it seems almost conclusive that he was unlawfully paid by his firm $833.33 per month for eight months from March 30, 1882, to November 30, 1882. Mr. Vaughan testified about this $766.66 note as follows (Graves' Rec., 451):

"Q. I will ask you, Mr. Vaughan, what the note dated December 4, 1882, payable to J. K. Graves for $766.66 was given for? A. I cannot tell what that note was for.

Q. Did you ever ask Mr. Fay what it was given for? A. No, sir."

Mr. Graves, as appears by his testimony, expected to be paid by the firm the full amount of his special capital invested, for he says (Graves' Rec., 1,049), I supposed when I went in the firm as a special partner, that in addition to my $10,000 per annum that my partners would be liable to me for my special capital. My idea was at the end of the time, that the firm would pay me my capital back unless we made a new arrangement.

If this court shall find as the court below did, in its decree of November 17, 1885,

"That on or about the 20th day of August, 1882, said firm was insolvent and so continued to the termination of its business with the knowledge of each of the members thereof, and that all the property and effects held by said limited partnership on that date and subsequent thereto, and when said judgments were confessed, were a special trust fund for the payment of the firm debts ratably among its creditors,"

then these monthly payments of $833.33 and all other payments made by the firm to Graves during August, September,

October and November, 1882, were not only unlawfully, but fraudulently made, and fraudulently received by Mr. Graves. The limited partnership having been duly organized, succeeded on March 30, 1882, to the wholesale grocery business of the old firm, and with its credit improved, on account of the admission into the firm of Julius K. Graves as a special partner for five years, bought large quantities of merchandise on credit in nearly every large city from the Atlantic to the Pacific coast. The required teas, coffees, and imported goods from New York, sugars, syrups, etc., in Boston, rice and other southern products in New Orleans and Baltimore, and canned fruits from California. The firm's sales for the year 1882 amounted to $1,592,130.97 (Graves' Rec., 464); and their liabilities at the time of their suspension on January 22, 1883, to about $350,000. Mr. Fay says (Graves' Rec., 966) that he should think there was $350,000 of the indebtedness of Boies, Fay & Conkey outstanding at the time of the suspension. Here then, in about four months after the formation of this limited partnership, it is found by the firm to be insolvent.

What is the duty of the partners in a limited partnership—general partner or special partner—when they learn that their firm is insolvent?

Troubat on Limited Partnership, Secs. 393–4–5–6, lays down the rule to be that

"Under the Limited Partnership Act as soon as a firm ascertains that it is insolvent, a responsible trustee should be appointed to take the firm's assets and dispose of them to the best possible advantage, and then, out of the fund realized, pay the creditors of the firm ratably in proportion to the amount of their several debts."

Chancellor WALWORTH in *Innes* v. *Lansing*, 7 Paige, 585, says:

"The statutes relative to limited partnerships appear to have constituted the effects of the firm a special fund for the benefit of all the creditors, which

fund, in case of insolvency, is to be distributed among such creditors ratably in proportion to the amount of their respective debts."

In *Whitcombe* v. *Fowle*, 56 Howard Practice, at page 367, the court says:

"The doctrine laid down in *Innes* v. *Lansing*, 7 Paige, 583, has never been disturbed or disputed."

What did the members of this limited partnership do, when *they* ascertained that their firm was insolvent?

About August 15, 1882, Mr. Vaughan (the firm's confidential book-keeper and cashier) furnished to the firm his semi-annual statement, which showed the firm's insolvency. Mr. Graves came from Dubuque to Chicago to examine it, and to confer with his general partners as to what course they should thereafter pursue. At this time the limited partnership had sufficient assets so that, if they had been placed in the hands of a trustee or receiver, the firm creditors would have realized about eighty cents on a dollar on their several claims. But, instead of adopting this honorable way of closing their business, the firm, in defiance of the law under which their co-partnership was formed only four months before, decided on a different course. First, they seem to have voted unanimously in favor of destroying the statement prepared by Mr. Vaughan so it could not be entered on the firm's books, and agreed not to tell any one about the firm's insolvency except their attorneys, Flower, Remy & Gregory, and L. J. Gage, of the First National Bank of Chicago, a friend of J. K. Graves, and Frank M. Blair, of Felix, Marston & Blair, a friend of Mr. Conkey. Next they all seemed to be in favor of the firm's making and selling for cash through their brokers, Messrs. Beveridge & Dewey, on the markets of New York and Boston, large amounts of the three and four months' notes of the limited partnership; and next, to have Mr. Fay go to New York and Boston and buy up large quantities of goods on the firm credit

so built up by the admission of Graves into the firm as a special partner for five years.

This, we maintain, was the beginning of the greatest fraud ever perpetrated among the wholesale grocers of the United States; and the appellants, Julius K. Graves and Benjamin B. Fay, are charged with being the instigators and prime movers in this grand scheme to defraud the merchandise creditors of this limited partnership out of enough money to enable the firm to pay the First National Bank of Chicago in full; then to let Julius K. Graves get back—first, the amount of the special capital he contributed; second, to have the $25,000 note which was held by him and to fall due September 20, 1882, paid (he having been paid $25,000 by the firm since March 30, 1882,); third, to pay all the firm notes on which he (Graves) was liable as endorser; fourth, to pay Julius K. Graves at the rate of $10,000 per annum from the time he went into the firm up to the date when they should thereafter decide to suspend; and fifth, to let Mr. Fay and Mr. Conkey take and equally divide whatever excess there might be—the amount to be realized by Fay and Conkey by the proposed fraud, to depend, of course, upon the quantity of goods Fay should succeed in buying on credit during his trip east, and upon the amount of firm notes Beveridge & Dewey should succeed in selling through their brokers in New York and Boston. At the proper time—the date to be thereafter mutually agreed upon—the members of the limited partnership were to go through the form of a dissolution, and B. B. Fay and L. W. Conkey were to pretend to announce themselves to be general partners under firm name of Fay & Conkey, and as successors to the firm of Boies, Fay & Conkey, and assume and pretend to be the owners of all of Boies, Fay & Conkey's merchandise, worth about $200,000, and of the outstanding indebtedness due to them, amount-

ing to about $150,000. Then, whenever J. K. Graves should find goods and money enough in sight to make him whole on his various pretended loans, endorsements and investments, he was to pretend that he had been deceived by Fay, and decline to further endorse for Fay & Conkey, when they should proclaim this to the firm creditors as an excuse for their failure, and immediately confess judgments enough to Graves, and his friends, so that the entire stock of goods and the outstanding indebtedness due to the firm could be gathered in under execution sales and creditors' bills—all of said parties well knowing that a limited partnership, under the laws of Illinois, could not lawfully prefer creditors, nor confess judgments in contemplation of insolvency. In pursuance of this fraudulent scheme Julius K. Graves remained in Chicago from about August 20, 1882, until about September 28, 1882, and took Mr. Fay's place in the office as financial manager, while Fay went east to buy goods on the firm's credit. On this point J. K. Graves testified (Graves' Rec., 1,054) as follows:

I told him (Vaughan) always to draw on the First National Bank—pay everything that came in and draw checks on that bank.

Q. And you arranged to have these checks paid, did you? A. Yes, sir.

Q. With Mr. Gage? A. I told him (Mr. Gage) I would personally guarantee every check that Mr. Vaughan would draw while Mr. Fay was away. I would not leave the city without having it satisfactorily arranged, regardless of the amount. During his absence (Graves' Rec., 1,042) at the east, I used to go down to the store every morning about ten o'clock, and the cashier would figure up his remittances and show me his payments to be made, and it devolved on me to see they were made—provide the funds.

About September 28, 1882, Mr. Fay returned to Chicago, having carried out the first part of the scheme assigned to him, and having succeeded in placing orders, and purchasing on the firm credit, about $450,000 worth of goods and merchandise. On September 29, 1882, the First National Bank, acting through Mr. Gage, required Boies, Fay & Conkey to deposit $625 as security to the bank for becoming responsible for costs

in two suits commenced by the firm in Dakota. (Bank Rec., 149.)

The expert accountant, Weinschenck, finds from the books of the firm (Graves' Rec., 463) that on December 1, 1882, the liabilities of Boies, Fay & Conkey amounted to $451,442.62.

During Mr. Fay's absence Mr. Vaughan executed and delivered to J. K. Graves a note for $5,000, which reads as follows (Graves' Rec., 429):

DUBUQUE, Iowa, September 11, 1882.

$5,000.

Three months after date we promise to pay to the order of J. K. Graves five thousand dollars at Dubuque County Bank of Dubuque, value received, with interest at eight per cent. per annum after date until paid, and if suit is brought for the collection of this note, a reasonable attorney's fee shall be allowed and taxed with the costs in such suit.

Due December 11, 1832. BOIES, FAY & CONKEY,

By T. F. VAUGHAN.

Protested for non-payment December 14, 1882.

J. K. GRAVES' KNOWLEDGE OF THE FIRM'S INSOLVENCY.

As appellant's counsel claimed in the court below, that Mr. Graves knew nothing of the firm's insolvency until January 20, 1883, we will call the attention of the court to some of the testimony relating to his (Graves') knowledge of the firm's financial condition, and to the investigations he made during Mr. Fay's absence in August and September, 1882. John H. Kistner, the firm's city book-keeper, says (Graves' Rec., 475:

I was employed by Boies, Fay & Conkey from November 1, 1881, to the time the firm failed on January 22, 1883.

Q. (Graves' Rec., 495.) Do you recollect the circumstance of Mr. Fay being absent in the east, during the latter part of August or September, 1882? A. Yes, sir.

Q. Who, if any one, took his place at the store during his absence? A. Mr. J. K. Graves sat down at his desk.

Q. How was he occupied during the time he was there, so far as you observed? A. Looking over letters and papers, and so forth.

Q. Did you ever see him examine any of the books of the firm, or accounts, or bills payable book? A. Saw him examining the bills payable book. I noticed he had that book every day he was there.

WILLIAM A. BOIES testified on this point as follows:

Q. (Graves' Rec., 274.) Did you hear the testimony of Mr. Kistner given here to day, relative to his seeing Mr. Graves looking over the bills payable book? A. I did.

Q. Have you also seen him look that book over—the bills payable book? A. I did.

Q. During Mr. Fay's absence in the east? A. Yes, sir.

Q. Did you learn of his seeing the private ledger, that is identified in your former deposition, during Mr. Fay's absence? A. I learned he had seen it while Mr. Fay was absent.

Q. How was that book usually kept by the firm? A. Kept in the large safe in the money box, locked up.

Q. Locked in a separate box? A. Yes, sir.

Q. Who had charge of that box? A. Mr. Fay had a key to it, and Mr. Vaughan the cashier.

Q. That private ledger, as you understand, disclosed the financial condition of the firm? A. Yes, sir.

Q. Did you have, during the time Mr. Fay was east in September, 1882, an interview or conversation with Mr. Conkey relative to Mr. Graves having seen that private ledger? A. I did.

Q. What was said at that time between you and Mr. Conkey about that? A. I said Mr. Graves had seen the private ledger; and he said, "Well, wonder what conversation Mr. Fay had had with Mr. Graves at the time he went in there"—neither he nor I knew—and Conkey said at that time, "If Fay did not tell him our exact standing, it must be now all known, and there would be liable to be trouble between him and Mr. Fay." We neither of us knew the conversation that Mr. Fay had with Mr. Graves as to the financial condition of the concern—supposed of course, Mr. Fay told Mr. Graves the entire thing.

Mr. VAUGHAN testified in regard to making and delivering the August, 1882, statement and the firm's financial condition in substance as follows:

By Mr. MANNING to Mr. Vaughan (Graves' Rec., 389): Q. Do you know of the taking of an inventory on or about August, 1882, by the firm? A. I do, yes sir.

Q. Was a balance sheet struck soon after the taking of that inventory by the firm? A. Yes sir.

Q. Will your books here show that balance? A. No sir.

Q. What book will show that? A. No book.

Q. Did you make a balance sheet? A. I did.

Q. What did you do with it? A. I gave it to Mr. Fay.

Q. (Graves' Rec., 390.) About what time did you deliver it to him? A. As soon after the first of August as the books were closed, somewhere in the neighborhood of the 15th of August, 1882.

Q. Did you speak of it to any other member of the firm? A. Yes sir.

Q. Do you remember the circumstance of Mr. Fay, soon after the taking of that inventory, and after the making of that balance sheet, going east to buy goods? A. Yes sir.

Q. (P. 391) Do you remember that Mr. Graves came and remained here during his absence? A. Yes sir.

Q. And occupied his desk in the office? A. Yes sir.

Q. (Graves' Rec., 396): Mr. Fay was the financial manager of the firm, was he not? A. Yes sir.

C. Q. (Graves' Rec., 891): What amount of loss was shown by that statement, from the first of January, 1882, to August, 1882? A. If I remember correctly, about $39,000.

C. Q. And in that $39,000 was there anything taken into account with reference to stale and uncollectible debts? A. Only a very few had been charged up in the six months.

C. Q. About what amount of stale and uncollectible debts did the firm hold the first of August, 1882, that was not taken into account in making that statement? A. I should say about $50,000.

C. Q. They were treated in that statement as good accounts due the firm? A. As assets.

C. Q. How much did the firm make or lose from August, 1882, to January 1, 1883? A. I am not quite positive, but I believe about $12,000 loss.

C. Q. Would you say the stale and uncollectible debts were any different on January 1, 1883, from what they were on August 1, 1882? A. Yes sir. I should say they were in the neighborhood of $60,000 on January 1, 1883.

C. Q. (Graves' Rec., 897): Suppose you had charged up the $50,000 bad debts to profit and loss when you made the August, 1882, inventory, which way would the surplus have been as regards the capital of this firm? A. I think it would have been against them.

Mr. WEINSCHENK, an expert book-keeper and accountant with thirty-three years' experience (whose testimony is not contradicted) after a careful examination of the firm's books of account, testified (Graves' Rec., 453) as follows:

Q. What, according to the books, was the amount of capital of Boies, Fay & Conkey on the first of January, 1882? A. On the 1st of January, 1882, it was $34,361.92.

Q. Can you tell by the books whether the firm made or lost money from January 1, 1882, to August 1, 1882? A. They show a loss.

Q. What amount of loss do the books show from the 1st of January, 1882, to August 1, 1882? A. $37,867.80.

Q. In making that calculation of the losses, have you taken into account anything for stale and uncollectible debts due the firm at that time? A. I have not.

Q. Assuming that there were $50,000 of stale and uncollectible debts due the firm on the 1st of August, 1882, what then would have been the losses of the firm from January 1, 1882, to August 1, 1882? A. It would have been $87,867.80.

Q. (Graves' Rec., 454.) What amount, if any, of loss was charged to the account of Henry M. Boies as his share for the year 1880? A. $7,243.27.

Q. What amount of loss, as appears by the books, was charged up to Benjamin B. Fay as his share of the losses for the year 1880? A. $5,691.14.

Q. What amount to Lucius W. Conkey as his share of the losses for the year 1880? A. $4,311.47.

Q. Assuming that Benjamin B. Fay was to share 42 per cent. of the losses of 1881, what amount of the capital, if any, would stand to the credit of Benjamin B. Fay on the 1st of January, 1882? A. $6,632.07.

Q. (Graves' Rec., 455.) Assuming that Benjamin B. Fay was to share 42 per cent. of the losses of 1882, what would be the standing of his account on the 1st of August, 1882? A. He would owe to the firm $18,938.13 on the 1st of August, 1882.

Q. That is, his account would be overdrawn in that sum, and his entire capital exhausted, is that what you mean? A. Yes.

Q. Assuming that Benjamin B. Fay was to share 42 per cent. of the losses for the year 1882, what would be the condition of his account on the 1st day of January, 1883? A. He would owe $29,555.38 due the firm from him.

Q. Assuming that William A. Boies was to share 33 per cent. of the losses of 1881, what would be the condition of his account on the 1st of January, 1882? A. He would have a capital remaining on that day of $20,336.66.

Q. Assuming that William A. Boies was to share 33 per cent. of the losses of 1882, what would be the condition of his account on the 1st of August, 1882? A. There would be a capital remaining to his credit on August 1, 1882, $676.90.

Q. Assuming that William A. Boies was to share 33 per cent. of the losses for the year 1882, what would be the condition of his account on the 1st of January, 1883? A. He would owe to the firm $5,453.21.

Q. Assuming that Lucius W. Conkey was to share 25 per cent. of the losses of 1881, what would be the condition of his account on the 1st of January, 1882? A. Be a capital remaining to his credit on January 1, 1882, of $7,393.19.

Q. (Graves' Rec., 456.) Assuming that Lucius W. Conkey was to share 25 per cent. of the losses of the year 1882, what would be the condition of his account on the 1st of August, 1882? A. He would owe the firm $4,912.06.

Q. Assuming that Lucius W. Conkey was to share twenty-five per cent. of the losses of 1882, what would be the condition of his account on January 1, 1883? A. He would owe to the firm $15,990.51.

Q. Did you, in these estimates between the respective partners of Boies, Fay & Conkey, take into account any stale or uncollectible debts? A. I have not.

Q. If, as a matter of fact, the firm had due to it on the 1st of August, 1882, $50,000 in stale and uncollectible debts, what then would have been the condition of accounts of the partners, Boies, Fay & Conkey? A. The shrinkage would be that much more *pro rata* among the partners.

(By Mr. Flower): Q. In other words, their losses would be increased to that extent? A. Yes, sir.

The defendant, BENJAMIN B. FAY, was examined as a witness, and on the question of the financial condition of the firm, testified as follows:

(By Mr. Manning to Mr. Fay, Graves' Rec., 289): Q. Mr. Vaughan has testified that of the August, 1882, inventory he made but one copy, one balance sheet or statement of the standing of the firm, and that one statement was delivered to you? A. Yes.

Q. Was that true? A. I do not know whether he made more than one or not. I know there was a memorandum drawn off and I looked it over at that time, but my best recollection of it was, it was destroyed.

Q. He further states that—the January inventory of 1883—a copy was made and delivered to you, and that in a few days thereafter you came and said that you had given that copy to Mr. Graves, and wanted another, and he made another for you. Is that true? A. I think that was true.

Q. (Graves' Rec., 290.) You have filed an answer in this case, have you not? A. I think so.

Q. In your answer you say, on January 22, 1883, your firm had stale and uncollectible debts amounting to $60,000. Do you state that now? A. Well, that was my best knowledge.

Q. And is it now your best knowledge? A. Well, yes. I should think it was.

Q. Do you recollect whether on the 1st of August, 1882, when the statement was made by Mr. Vaughan showing the financial condition of your firm, $60,000 or $50,000, or any other sum was deducted from the assets? A. I do not recollect what the amount was deducted.

Q. Was there any amount deducted in the August inventory, for bad debts? A. I cannot say that there was.

Q. (Graves' Rec., 291.) Do you know how much capital, if any, your firm had in excess of its liabilities, bad debts, etc., on January 1, 1882? A. I do not recollect the exact amount we made out at that time; we had considerable money that we used right along in our business, we had the use of; and we had the use of $100,000 all that time. In the year 1882 we did a very large business, and there were a great many goods bought, and the shrinkage was large.

Q. (Graves' Rec., 292.) Did your firm do a profitable or an unprofitable business from January 1, 1882, to August 1, 1882, if you know, after deducting from the accounts and bills receivable such portions as were uncollectible? A. It was not a profitable business.

Q. Wasn't it unprofitable? A. Yes.

Q. From August, 1882, to January 1, 1883, did your firm do a profitable, or an unprofitable business? A. Did an unprofitable busines.

Q. How much money did you lose during that time, if you know? A. Well, the loss on merchandise, as it showed was in the vicinity of $10,000.

Q. How much was lost on accounts in the country, and on bills receivable? A. Something I cannot tell.

WILLIAM A. BOIES was examined in regard to the firm's losses, and testified as follows (Graves' Rec., 268):

Q. Do you recollect how much loss was shown from the time Graves went in (March 30, 1882,) up to the August (1882) inventory? A. Over $25,000.

C. Q. (Graves' Rec., 881.) You have testified in your direct examination that you were not satisfied with Fay's management of the business. What was the first thing that arose to occasion dissatisfaction after Graves went into the firm in March, 1882? A. The general management, I was not satisfied with.

C. Q. Was there anything arose between you with reference to Mr. Fay's drawing more money than you thought he should draw during that summer, 1882? A. Yes, sir.

C. Q. (Graves' Rec., 882.) How much did he draw at the time you refer to, and when was it? A. $5,000. I do not recollect the date.

C. Q. Did he draw that without conferring with you? A. Yes, sir.

C. Q. Didn't you draw more than you would otherwise if Fay had not drawn that $5,000? A. Might.

C. Q. Don't you think you did? A. Perhaps.

The expert accountant, Weinschenk, says (Graves' Rec., 461), that from January 1, 1882, to January 22, 1883, B. B. Fay drew out of the firm in cash, and had charged to his private account $16,461,26.

JOHN J. DUFFY says (Graves' Rec., 537), in substance:

I commenced working for the firm of Boies, Fay & Conkey as salesman in 1876, and continued with the firm until Monday, January 22,1883. On Saturday, January 20, 1883, I noticed an unusual transaction by the firm. (p. 538-9.) I left the store after 6 o'clock in the evening, and both Fay and Conkey were getting into the store a car-load of flour which had arrived at the depot after the firm's regular teamster had gone home. I told Fay and Conkey that I had 100 barrels of the flour sold, and that it could be delivered on Monday direct from the freight depot to the customer, and thus save cost of cartage. Fay and Conkey replied that the flour must be put in their store that night. On Monday morning I asked to have the 100 barrels flour delivered, when Conkey told me it could not be sent until about noon.

Q. (Graves' Rec., 539.) Did you get it about noon? A. No, sir.

Q. Why didn't you? A. They were closed by the sheriff.

Q. Was this flour in the store at the time the store was closed by the sheriff? A. Yes, sir.

Mr. Duffy says further (Graves' Rec., 540), in substance:

While Mr. Fay was away during the summer of 1882, Julius K. Graves came to the store—occupied Mr. Fay's desk—and I saw Graves looking over the firm's bills receivable, bills payable book, and bank book; he was frequently at the store from the time the limited partnership was formed, up to the fall of 1882.

Edwin E. Olin says (Graves' Rec., 541), in substance:

I have been in the teaming business. During the past ten years I have been employed by Boies, Fay & Conkey—I done their hauling—I used to see Julius K. Graves there. He always seemed to be sitting at Mr. Fay's desk. In August or September, 1882, he took Mr. Fay's place; took charge of the business, as I understood it. I had to go to Mr. Graves for orders. He was there from two to four weeks. Mr. Fay was then in New York. During Mr. Fay's absence, Mr. Graves occupied his desk, which was in the office

where the books of the firm were kept. While Mr. Graves was there and Mr. Fay was away, Thomas Vaughan was the cashier. I hauled goods (Graves' Rec , 542) during the months of September, October, November and December, 1882, to warehouses for the firm. I have known two thousand cases, and over, a day to come in during the above time. I recollect one lot of twenty-two hundred and fifty (cases); that was quite late in the season of 1882; they were mostly canned goods. I couldn't tell (Graves' Rec., 543) how many cases of goods I took to either of these warehouses during October, November and December, 1882; there was a good many heavy line of goods went in. My judgment would be there were 50,000 cases, counting September. Out of these 50,000, some lines (page 544) we never did touch at all. Perhaps from 3,000 to 5,000 were removed; do not know what became of the balance of the 50,000. I only know of (Graves' Rec., 543) 120 cases being in warehouse on the 22d day of January, 1883, when the store was closed by the sheriff.

C. Q. (By Mr. Flower, Graves' Rec., 564.) You say from memory that there was somewhere from 40,000 to 45,000 cases of goods there that went in during the fall and never went out through you or your teams; is that what you want to be understood to say? A. Yes, sir.

C. Q. Do you know what became of the warehouse receipts? A. No, sir, I do not. It was the talk that the warehouse receipts could not be got at. I do not know where they were.

C. Q. Then, do you mean to say, or have it understood here, that Fay & Conkey or Boies, Fay & Conkey, have misappropriated or concealed these goods, by your testimony; is that the inference you want to take? A. I do not know anything about it. The impression I carried in the fall was this, if you want my opinion on it. (p. 565.) I say, along in the fall there was very queer transactions. There was about half a dozen men (salesmen) after me all the time for canned goods, and I could not tell them we had them. I would get a line, and they were ordered into warehouse. I was under Mr. Lynch's orders—Lynch had charge of the wagons. We were trying to have these salesmen understand these goods had not arrived.

C. Q. (Graves' Rec., 565.) What salesmen? A. The city salesmen, several of them.

C. Q. What became of the goods? A. I do not know; could not tell you, sir. I used to go around in back streets, in places to keep away from the store, so they would not see me going by. They (the canned goods) were branded and could be easily noticed.

C. Q. What was your (the) reason why you should not come near the store? A. We did not want the city salesmen to know that the goods had arrived. They were wanting them for their customers.

Mr. Fay knew and fully realized that he must succeed in purchasing several hundred thousand dollars' worth of goods on credit, or else no large sum would be realized, for division between him and Mr. Conkey. Graves, it appears, on the return of Fay, kept his promise to Mr. Gage, and satisfactorily arranged with the First National Bank for all overdrafts made by Mr. Vaughan while Fay was away.

Mr. Gage Required Merchandise as Security for Over-drafts.

Let us now see how the overdrafts are provided for by the firm after Mr. Fay's return, which was about October 1, 1882. It appears that an arrangement was entered into between Mr. Fay and Mr. Gage, of the First National Bank, under which the bank should be protected in case the firm became troubled financially. On this point Mr. Fay testified (Graves' Rec., 348), as follows:

I think I told Mr. Gage in case of any trouble with our firm, they (the bank) should be protected.

Q. When did you tell him that? A. I told him so during the year 1882, and, perhaps, the year previous to that time.

Q. And was that all the talk you ever had with him, referring to giving judgment notes in favor of the bank? A. Yes, sir.

On October 6, 1882 (Graves' Rec., 727), it appears that the firm wished to overdraw its account at the First National Bank $577.55, when Mr. Fay, knowing that his firm was just getting into trouble, and knowing of his promise to Mr. Gage to protect the First National Bank in case of trouble, turned out to the bank sufficient of the firm's goods, which he had recently bought on credit, to secure the bank on this overdraft. On October 7th, another overdraft of $3,196.98 is provided for in the same manner. On the 9th, another of $2,246.20. On the 10th, another of $1,712.79. On the 11th, another of

$4,934.89. On the 12th, another of $10,126.25. On the 13th, another of $6,371.66. On the 14th, another of $2,637.22. And in addition to this overdraft on the 14th, the firm borrowed from the bank $10,000 and gave its demand note, with sufficient goods as collaterals to secure it. (This note is shown in Graves' Rec., 1,074). Mr. Gage was examined about these several overdrafts and pledges of goods as security, and testified as follows:

Q. (By Mr. MANNING to Mr. Gage, Graves' Rec., 726.) Did you at any time during the fall of 1882, in behalf of the bank, make any loans to the firm of Boies, Fay & Conkey, for which you took warehouse receipts as collateral security? A. Yes, sir.

Q. What date and amount? A. I find on October 14th a loan of $10,000, and on October 18th a loan of $10,000.

Q. Were those demand loans? A. Those loans were on demand.

Q. With warehouse receipts as security? A. With warehouse receipts as security—of some kind of goods.

Q. About what value of goods did you take for the two loans of $20,000? A. I supposed the value was $22,000 or $23,000.

C. Q. (By Mr. FLOWER, Graves' Rec., 740.) Mr. Gage, your attention was called to certain overdrafts that appear upon the books of the bank upon the account of Boies, Fay & Conkey, running from October 6th to October 15th. Will you please state whether or not you had collateral security at that time for such overdrafts? A. We did have warehouse receipts for goods in addition to those pledged for $20,000, or loan against which the overdraft was made.

C. Q. (p. 741.) Your attention was also called to certain overdrafts between the 2d and 6th of December inclusive. Will you state whether you held any collateral securities for these overdrafts the 6th of December, 1882? A. Yes, sir. It was against goods we held.

TRANSACTIONS OF OCTOBER 17, 1882.

We now come to October 17, 1882, an important day, and one that furnishes an interesting chapter in the history of the short-lived limited partnership of Boies, Fay & Conkey. Mr. Fay has returned from his foraging expedition after goods, in high glee over his success in obtaining large quantities of mer-

chandise on the firm's credit, and has been at the helm again as financial manager for the firm about fifteen days, during which time he, in behalf of the limited partnership, has, through negotiations with Mr. Gage, pledged to the First National Bank of Chicago, as collateral security, about $50,000 worth of firm goods, when Mr. Graves again appears in Chicago to tender his congratulations to Fay on his success, and for further consultation with Mr. Gage. On October 17, 1882, after full consultation, the four partners, Boies, Fay, Conkey and Graves, agree to sign a paper which shall purport to dissolve the limited partnership—neither partner on this day sells, or in any manner disposes of his interest in the firm—they merely sign a paper which reads as follows (Graves' Rec., 795):

First Pretended Dissolution Agreement.

"This certifies that the limited partnership formed under the laws of the State of Illinois, the 30th day of March, A. D. 1882, by and between Wm. A. Boies, a resident of Evanston, Benjamin B. Fay, a resident of Chicago, and Lucius W. Conkey, a resident of Evanston, all in the State of Illinois, as general partners, and Julius K. Graves, a resident of Dubuque, in the State of Iowa, as special partner, for conducting and prosecuting the business of wholesale grocers and importers under the firm name and style of Boies, Fay & Conkey, and which limited partnership by its terms, was to terminate on the 30th day of March, A. D. 1887, is terminated and ended by mutual consent, from and after the date hereof. Witness our hands at Chicago, Illinois, this 17th day of October, A. D. 1882.

Wm. A. Boies,
Benjamin B. Fay,
Lucius W. Conkey,
Julius K. Graves."

After signing this paper, the partners secretly agree not to publish it, or proclaim it, until such time thereafter as they should mutually agree upon. At the time of signing this paper, neither Boies nor Graves had pretended to dispose of their several interests in the firm. In Graves' Rec., 918, it appears

by the certificate of Myra Bradwell, that she published a pretended dissolution notice six times from December 2, 1882, to January 13, 1883, in a weekly secular paper specially authorized to publish legal notices, called "Chicago Legal News," but the record shows that the notice she published is different from the certificate filed in the county clerk's office, and neither of the original notices was produced before the examiner nor in the court below.

On the next day, October 18, 1882, these four partners, (entirely disregarding the pretended dissolution paper signed by them the day before, in which they said "The limited partnership terminated and ended by mutual consent from and after the 17th") continued their business in the name of Boies, Fay & Conkey, and made another demand loan of $10,000 from the First National Bank, through Mr. Gage, and pledged as collateral security therefor, about $12,000 more of the goods bought by Fay on the credit of the limited partnership. (This demand note is shown in Graves' Rec., 1,075.) On October 19, 1882, Boies, Fay, Conkey and Graves meet in the office of Flower, Remy & Gregory, their attorneys, when, after full consideration, it is agreed that Boies will sell, or pretend to sell out his interest in the firm, to Fay & Conkey for $5,500 (Graves' Rec., 917) and take their notes on long time without security, and they pretend to agree upon the terms for another dissolution, when Mr. Remy prepared an agreement, which Boies, Fay and Conkey signed. It reads as follows (Graves' Rec., 269):

Second Pretended Dissolution Agreement.

"The copartnership heretofore existing by and between Wm. A. Boies, Benjamin B. Fay and Lucius W. Conkey under the firm name and style of Boies, Fay & Conkey, is dissolved by mutual consent from this date. Mr. Wm. A. Boies retires from the said firm. All accounts and demands against

said firm will be settled by Messrs. Fay & Conkey. They will also collect all claims and demands due and owing the said firm, and are alone authorized to receive the same and sign the firm name in receipt and liquidation thereof.

CHICAGO, October 19, 1882.

WM. A. BOIES,
BENJAMIN B. FAY,
LUCIUS W. CONKEY.

Later, but on the same day, October 19, 1882 (Graves' Rec., 816), another and different dissolution paper was drawn by Mr. Remy and signed by Boies, Fay & Conkey. It reads as follows:

THIRD AND LAST PRETENDED DISSOLUTION AGREEMENT.

"It is hereby stipulated and agreed by and between the parties hereto that the partnership heretofore existing between Wm. A. Boies, Benjamin B. Fay and Lucius W. Conkey, under the firm name of Boies, Fay & Conkey, is this day dissolved by mutual consent. The said dissolution shall date from the first day of November, 1882, and legal notice thereof shall be published on or before the 10th day of November, 1882.

Witness our hands and seals this 19th day of October, 1882.

WM. A. BOIES,
BENJAMIN B. FAY,
LUCIUS W. CONKEY."

In addition to these two dissolution notices, dated October 19, 1882, Fay & Conkey on that day signed and delivered to Boies, in Flower, Remy & Gregory's office, a paper which reads as follows (Graves' Rec., 272):

AGREEMENT TO USE NAME OF BOIES, FAY & CONKEY.

"In consideration of the sale this day made by Wm. A. Boies of his interest in the firm of Boies, Fay & Conkey to us, and the further consideration of one dollar to us in hand paid, we hereby assume and agree to pay all the outstanding indebtedness of the firm of Boies, Fay & Conkey, of every name and nature now contracted by us, or either of us, in the said firm name, now

or hereafter, and we jointly and severally contract and agree to hold said Wm. A. Boies harmless from any liability on account thereof.

Witness our hands and seals this 19th day of October, 1882.

BENJAMIN B. FAY. [SEAL.]
LUCIUS W. CONKEY. [SEAL.]"

Mr. Boies says in regard to paper last shown (Graves' Rec., 273): This paper is in the handwriting of Mr. Remy, of the firm of Flower, Remy & Gregory, and that he in their office on October 19, 1882, executed a bill of sale of his interest in the firm, which bill of sale reads as follows (Graves' Rec., 916, 917):

WM. A. BOIES' PRETENDED BILL OF SALE.

"Know all men by these presents, That I, Wm. A. Boies, of the village of Evanston, of the county of Cook and State of Illinois, party of the first part, for and in consideration of the sum of fifty-five hundred dollars, lawful money of the United States of America, to him in hand paid, at or before the ensealing and delivery of these presents by Benjamin B. Fay and Lucius W. Conkey, of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and delivered, and by these presents do grant, bargain, sell and deliver unto the said party of the second part all the following goods, chattels and property, to wit: All of my right, title and interest in and to all the assets of every name and nature wherever located, of the firm of Boies, Fay & Conkey; and said Benjamin B. Fay and Lucius W. Conkey as a further consideration of said transfer, assume and agree to pay all the liabilities of the said firm of Boies, Fay & Conkey. To have and to hold the said goods, chattels and property unto the said party of the second part, his heirs, executors, administrators and assigns, to and for—own proper use and behoof forever. And the said party of the first part does vouch to be the true and lawful owner of the said goods, chattles and property, and have in him full power, good right and lawful authority to dispose of the said goods, chattles and property in manner as aforesaid; and I do for myself and my heirs, executors and administrators, covenant and agree to and with the said party of the second part to warrant and defend the said goods, chattles and property to the said parties of the second part, their executors, administrators and assigns, against the lawful claims and demands of all and every person and persons whomsoever.

In witness whereof I have hereunto set my hand and seal the 19th day of October, in the year one thousand eight hundred and eighty-two.

WILLIAM A. BOIES. [SEAL.]

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

I, Curtis H. Remy, a notary public in and for said county, do hereby certify that this instrument was duly acknowledged before me by the above named William A. Boies, this nineteenth day of October, A. D. 1882.

CURTIS H. REMY,

[Notarial Seal.] *Notary Public.*"

L. J. GAGE KNEW OF SECRET DISSOLUTION.

Notwithstanding this secret arrangement not to tell any one about the signing of these pretended dissolution papers, Mr. Graves says (Graves' Rec., 381) that he did tell Mr. Gage about it, and the subsequent transactions between the First National Bank and the firm, will warrant the conclusion that Mr. Gage, the vice-president and manager of the bank, knew on October 17 and 19, 1882, all about the signing of these three secret dissolution papers.

Mr. Graves says (Graves' Rec., 381): My recollection of it is, that this was on the 17th day of October when I signed the dissolution; that is my recollection, I went into the First National Bank. I thought it was due to the bank. * * * I met Mr. L. J. Gage, I told him the circumstances under which I had withdrawn. * * *

Q. (Graves' Rec., 381.) About what date was that? A. I cannot give the date.

Q. As nearly as you can Mr. Graves? A. My recollection is, it was immediately after the 17th of October.

Q. By Mr. Flower (Graves' Rec., 1033.): When did you enter into an agreement of dissolution? A. October 17th, I think it was.

Q. Where was the conversation had with reference to it? A. I think it was in Mr. Remy's office. I think it was talked over at Mr. Fay's desk in the store, and the articles signed at Mr. Remy's office.

Q. Which articles do you refer to now—the one between Boies, Fay & Conkey, or the articles dissolving the limited partnership? A. I refer to the limited partnership.

Q. (Graves' Rec., 1,035.) Do you know, Mr. Graves, why the dissolution was not published at the time that you executed the agreement? A. Yes. I asked that the law be complied with and the publication made in due course. I was willing to have it delayed if, in the judgment of the resident partners,

it should seem best for their interest to do so. I informed the First National Bank, and came home and left the question of publication to them. I think that when I left, while I cared not how soon it was to be published, that I was led to think that it might not be until November following.

This testimony of Mr. Graves is not denied by Mr. Gage, and therefore establishes the fact that Mr. Gage knew of the pretended dissolution and that the date of their publication was left to him and Mr. Fay. The language of Mr. Graves is:

"I informed the First National Bank and came home and left the question of publication to them."

Mr. Graves did not leave for his home until all three of the pretended dissolution agreements were signed, for he admits being in Flower, Remy's & Gregory's office on October 19th when Boies pretended to sell out for $5,500 in long time notes of Fay & Conkey.

Mr. Gage testified on October 3, 1883, (Graves' Rec., 725) as follows:

I am vice president of the First National Bank of Chicago, and as an officer of the bank I had charge of the loans and accommodations extended to Boies, Fay & Conkey. I have known (Graves' Rec., 1,082) Julius K. Graves a long time. I knew in 1882 that he was associated with the Commercial National Bank of Dubuque, Iowa. During 1882 and 1883 the Commercial National Bank of Dubuque kept an account with the First National Bank of Chicago. On January 20, 1883, (Graves' Rec., 1,083) I had no doubt about the financial responsibility of Julius K. Graves.

Q. (Graves' Rec., 736.) Do you know (when) Julius K. Graves retired from the firm of Boies, Fay & Conkey? A. I do not now recollect.

Q. Did you ever have a conversation with Julius K. Graves with reference to the matter? A. I did.

Q. (Graves' Rec., 737, asked on October 3, 1883.) Did you ever see any printed notice of the dissolution of the firm of Boies, Fay & Conkey? A. Yes.

Q. When did you first see it? A. A few days ago, as far as I recollect.

Q. Did Julius K. Graves ever tell you *when* he retired from the firm of Boies, Fay & Conkey? A. Yes, sir, he did, either just before or just after, I am not certain which; he either told me of his intention and arrangement to retire, or the fact of the retirement itself.

Q. When did he tell you that? A. I cannot say; but it was right in

connection with the dissolution, either immediately before, or immediately after.

Mr. FAY testified as follows:

C. Q. (Graves' Rec.. 972.) Will you tell why it was that the (dissolution) of the limited partnership was not published at the date it purports to bear in October? A. Because of heavy payments. * * *

C. Q. What was said between you and Graves with reference to the withholding the publication of that notice? A. He said we could suit ourselves about it, but thought it would be better to publish it then, if we thought best.

C. Q. Did you tell him that Boies had consented to let it run along until the 1st of November? A. He (Graves) understood it was to be deferred until we mutually agreed to have it published.

By the terms of the paper heretofore shown Benjamin B. Fay and Lucius W. Conkey agree to pay for all the goods before then bought, or thereafter to be bought, in the name of Boies, Fay & Conkey—that is, the limited partnership is secretly dissolved, with leave to Fay and Conkey to continue to use its name and credit to obtain more goods.

If it be true, as will be claimed by appellants, that on October 17, 1882, the dissolution notice pretending to dissolve the limited partnership was actually, and in good faith, signed and executed by the four members of the limited partnership, what was the occasion for the other and different dissolution notices signed on October 19th? Again, if the limited partnership was actually and in good faith "terminated and ended by mutual agreement," as stated in the October 17th notice, and thereafter the business was to be continued under the name and style of Fay & Conkey, why was it necessary for them, on the 19th (two days afterward), to make an agreement with Boies by which the limited partnership name of Boies, Fay & Conkey might thereafter be used by Fay and Conkey, without any limit as to time, or as to the amount of debts which might be contracted by them in the limited partnership name?

If the October 17th dissolution paper was signed in good

faith by Boies, Fay, Conkey and Graves, for an honest purpose, and the dissolution was in fact to take effect on that day, why was it necessary on the 19th to contract and agree that "the said dissolution shall date from the 1st day of November, "1882, and legal notice thereof be published on or before the "10th of November, 1882?"

The pretended dissolution of October 17th is in no way referred to in those dated on the 19th, and therefore the one of the 17th may and should be regarded as abandoned by the parties. The record shows, and all parties admit, that no notice of either of these three pretended dissolution agreements was published, or in any way announced, by the firm to the public, or to the firm creditors, until December 2, 1882, when the second pretended dissolution notice heretofore shown appeared in the Chicago Evening Journal of that day. In other words, the dissolution paper last signed was first published and this does not announce that Graves had withdrawn from the firm.

First Publication of Dissolution Notice in Chicago Evening Journal.

In reference to such publication, Mr. Boies testified as follows (Graves' Rec., 268–9):

Q. When was the first publication notice published of the dissolution of the limited partnership? A. Along the first part of December, 1882, the first or second, along there.

Q. I now show you a publication notice of dissolution of partnership which appeared in the Chicago Evening Journal, December 2d, 4th, 5th and 6th, and ask you if that is the dissolution notice referred to by you (handing it to witness), and in connection with my question I now show you a copy of the Evening Journal, dated December 4, 1882, in which the publication notice appears (showing it to witness)? A. It is.

C. Q. (By Mr. Flower, Graves' Rec., 271.) Mr. Boies, have you any personal recollection of seeing this notice published in the Chicago Evening Journal of December 4th? A. Yes, sir.

C. Q. And to-day? A. Yes, sir.

C. Q. Did you see it published on the 2d? A. I did.

Boies further says (Graves' Rec., 273), in explanation of the delay in publishing the dissolution notice:

Mr. Fay did not want it published until November 1st.

Q. What reason did he give? A. That he had large payments to make, and it might impair the credit of the firm.

Q. And you assented to it, did you? A. I did.

Q. How was it on the 1st of November? A. He (Fay) inquired of Mr. Remy, if it would make any difference to run until the 15th of November. Mr. Remy said it would not. Later I asked him (Remy), and he told me it would be all right, but I insisted it should be issued on the 15th of November. Then I went away. When I came back to Chicago, I found it had not been issued(published) on the 15th, and I went to Mr. Fay, when he said he understood it to be the 1st of December. (p. 274.) I told him it was no such thing. Fay then said it would be an impossibility to issue it before the 1st of December. I told him if it was not issued on the first day of December, I should issue it myself. We had a few words about it.

Q. (Graves' Rec., 274.) And that interview brought about the publication on the 2d, as I understand it? A. I should imagine it did, if it had not I should have issued it myself.

Q. And that is the publication notice you have heretofore referred to as appearing in the Chicago Evening Journal on the 2d, 3d, 4th, 5th and 6th of December, 1882? A. Yes, sir.

Mr. Fay testified on this point as follows:

C. Q. (Graves' Rec., 972.) What was said between you and Graves with reference to the withholding the publication of that notice? A. He said we could suit ourselves about it, but thought it would be better to publish it then if we thought best.

C. Q. Did you tell him that Boies had consented to let it run along until the 1st of November? A. He understood it was to be deferred until we mutually agreed to have it published.

Mr. Fay, when being examined, was shown (Graves' Rec., 972) five checks signed by Boies, Fay & Conkey on the First National Bank of Chicago, and all payable to J. K. Graves.

One dated December 4, 1882, for	$1,000.
One dated December 6, 1882, for	2,000.
One dated December 11, 1882, for	2,000.

One dated December 12, 1882, for ..... 3,000, and
One dated December 16, 1882, for ..... 3,000, and

was then asked as follows (Graves' Rec., 973):

C. Q. These checks were signed by you, were they? A. They were signed by me.

C. Q. And paid through the bank? A. Appear to have been paid.

C. Q. Do you know when the check dated the 16th of December, 1882, was paid at the First National Bank of Chicago? A. I do not. These checks were dated ahead and sent to Mr. Graves.

C. Q. All of these checks were signed by you prior to December 2d, were they? A. Yes, sir.

C. Q. Did you then at that time (the time of signing these checks) have any idea as to when the firm would be changed to Fay & Conkey, and when you would publish this notice of dissolution? A. No, sir.

C. Q. Had you any arrangement by which you could carry along and withhold the publication of this notice indefinitely? A. It was a matter of agreement between ourselves—mutually understood by ourselves.

C. Q. That it should not be published until you agreed on it? A. Until we agreed on it.

C. Q. After the 2d of December is it not true that checks were paid promiscuously by the First National Bank (of Chicago), whether they were signed Fay and Conkey, or Boies, Fay & Conkey out of the same account? A. Yes, sir; whatever checks came in were paid, of course.

C. Q. Was it explained to the bank at that time when you changed your bank account, that there were checks out signed "Boies, Fay & Conkey," dated as much ahead as the 16th of December? A. I could not say; they under-stood they were to pay Boies, Fay & Conkey checks, if presented.

Q. (Graves' Rec., 310) Did you have a circular issued of the publication notice that appeared in the Chicago Legal News, announcing he (Graves) was out? A. I do not recollect that I did.

Q. Did you ever have any letters written by any of your employes to your creditors, announcing the fact that Graves was out of your firm? A. I do not know that the employes wrote anybody. * * *

By the exhibits 1 to 18 to Mr. Fay's direct examination (Graves' Rec., 320 to 329,) and Exhibits 1 to 39 on cross-examination (Graves' Rec., 977 to 993), it appears that after December 2d, 1882, and up to the day of the failure the firm carried on its correspondence and bought large quantities of goods in the name of Boies, Fay & Conkey, many of the bills

being stamped "B. B. Fay, Entered," and by Exhibits Nos. 29 and 30 (p. 987), and as late as January 18, 1883, Flower, Remy & Gregory corresponded with the firm and addressed them as Boies, Fay & Conkey, and not as Fay and Conkey.

Mr. Conkey testified in regard to dissolution and publication of notice, as follows:

Q. (By Mr. FLOWER, Graves' Rec., 915.) Where were the dissolution papers drawn in reference to the dissolution between Boies, Fay and yourself? A. That was in your office.

Q. Flower, Remy & Gregory? A. Yes, sir.

C. Q. (By Mr. Manning, Graves' Rec., 923.) Why was it that one kind of dissolution notice was put in the Legal News and another kind in the Journal, if you know? A. I do not know.

C. Q. You testified that you saw the dissolution notice in the Journal and in the Legal News? A. I did not say I saw it in the Legal News.

C. Q. You saw it in the Journal? A. Yes, sir.

C. Q. (Graves' Rec., 923.) This limited partnership was formed for five years, was it not? A. Yes, sir.

C. Q. Why was it discontinued or attempted to be discontinued in five or six months, if you know? A. I do not know what the reason was; Mr. Graves wanted to go out.

C. Q. (Graves' Rec., 962.) Did you ever call the attention of any creditor of your firm in any way or manner to the notice of dissolution which appeared in the Chicago Legal News? A. I do not remember that I ever did sir."

ALL GOODS SOLD IN BOIES, FAY & CONKEY'S NAME.

By the Exhibits Nos. 4 to 81 to Mr. Conkey's deposition (Graves' Rec., 927 to 957,). it appears that the firm continued to do its business and to buy and sell goods in the firm name of Boies, Fay & Conkey, from December 1, 1882, up to January 22, 1883, when the store was closed by the sheriff. Many of the goods being purchased and checked off by Mr. Conkey, and having his check mark and his initials L. W. C. thereon, in his handwriting.

By Exhibits 1 to 16 to Mr. Kistner's testimony (Graves'

Rec., 1115 to 1120), and Exhibits 67 to 78 to Mr. Conkey's (Graves' Rec., 950 to 955), it appears that Charles Johnson bought goods of the firm under the name of Boies, Fay & Conkey daily from December 11, 1882, to January 16, 1883.

"They are original invoices of goods sold by Boies, Fay & Conkey to Charles Johnson—that the abbreviation 1/2 1883, on Exhibit 67, means January 2, 1883; that the '1' on the other bills refers to January—that 'Book 316' signifies the sales-book in which the goods are entered, and Mr. Kistner further says that the bills were all made by the firm's regular shipping and bill clerk."

Mr. Kistner (Graves' Rec., 1114), on being shown Exhibits 67 to 78 (Graves' Rec., 950), to Conkey's deposition, says:

Said exhibit 67 just referred to, is as follows:

Cut of Building.

INVOICE

BOIES, FAY & CONKEY,

Importers and Jobbers of

TEAS AND GROCERIES,

113 & 115 So. Water St., 2 & 4 Dearborn St.

Chicago, 1/2, 1883.

To Chas. Johnson:

Book 316.

Page 31.

Salesman.....

Terms.....

1 Bx. Std. A. 332, 9.....	$29 88
10 Bx. Navy Clipp ½ 33.....	3 20
1 C. qts. Catsup.....	1 15
	34 23

This testimony shows that Charles Johnson, one of the firm's regular city customers, bought goods from the firm under the name of Boies, Fay & Conkey on the several dates, as follows (Graves' Rec., 1115 to 1120): December 11, 13, 14, 15, 16, 18, 19, 20, 21, 22, 26, 27, 28 and 30, 1882, and January 2, 3, 4, 5, 6, 8, 9, 10, 12, 13, 15 and 16, 1883.

ALL GOODS SHIPPED IN BOIES, FAY & CONKEY'S NAME.

We will next call attention to the goods shipped by the firm to their country trade from October 17, 1882, to January 22, 1883. At page 1145, Graves' record, the firm's shipping book for goods shipped by the Chicago, Burlington and Quincy railroad is introduced in evidence as Exhibit "A," and shows 115 different shipments by the firm under the name of Boies, Fay & Conkey, from December 21, 1882, to January 22, 1883, the last shipment being the day the firm's store was closed by the sheriff. At page 1166 of Graves' record, the firm's shipping-book for goods shipped by the Michigan Central railroad, is introduced in evidence as Exhibit "B," and shows fourteen different shipments by the firm under the name of Boies, Fay & Conkey, from October 17, 1882, to December 15, 1882. At pages 1193 to 1212 of Graves' record fifty-nine other shipments are shown in shipping-book, Exhibit "C," on the Pittsburgh, Cincinnati and St. Louis Railway Company; the Chicago and Eastern Illinois Railroad Company; the Pittsburgh, Ft. Wayne and Chicago Railroad Company, and Goodrich Transportation Company by the firm, under the name of Boies, Fay & Conkey, from October 17, 1882, to January 19, 1883.

At page 1213 (Graves' record) one of the firm's city receipt books is introduced in evidence as Exhibit "D," and shows (Graves' Rec., 1216–1222) thirty-three different lots of goods delivered by the firm under the name of Boies, Fay & Conkey to city jobbers in Chicago, from November 16, 1882, to January 17, 1883.

Mr. Olin, the man who had charge of hauling the firm's goods to the several freight depots, says (Graves' Rec., 1223):

"That the railroad receipt books put in evidence as Exhibits 'A,' 'B,' 'C' and 'D' are original shipping receipt books used by the firm during December, 1882, and January, 1883.

Q. Did you have books similar to them from any railroads not shown by these books; and, if so, please name the roads? A. We had shipping books from the Chicago and North-Western, Chicago, Milwaukee and St. Paul, Chicago, Rock Island and Pacific, and Illinois Central; they were all headed, "Boies, Fay & Conkey.'

Q. In what firm name did you ship the goods hauled to the several railroads by you during December, 1882, and January, 1883, up to the time the firm suspended? A. The goods were all shipped as Boies, Fay & Conkey's.

Q. The receipts taken in their name? A. Yes, sir.

There are nearly five hundred of the railroad receipts identified as originals by Mr. Olin (all being alike as to the heading), one of them taken for some goods shipped by him for the firm on Monday morning, January 22, 1883, before the store was closed by the sheriff, reads as follows:

No..... CHICAGO, January 22, 1883.

Received from Boies, Fay & Conkey, by the Chicago, Burlington & Quincy Railroad, the following articles, in good order, to be delivered in like good order as addressed, without unnecessary delay.

MARKS AND CONSIGNEE.	DESCRIPTION OF ARTICLES.
M. A. H. Mrs. M. A. Holland, Sandwich, Ill.	5 Bx. Herring, 1 Bbl. Sugar, 1 Hf. O. Meal, 1 Bbl. Salt, 1 Bx. Hominy, ½ Doz. Baskets, 1 Bx. Beans, 1 " Peaches, 1 " Chickens, 1 " S. Polish, 1 " Turkey.

1/22.
T. M. COOKE,
Connell.

SIGNS ON THE STORE NEVER CHANGED.

In regard to the signs showing the names of the proprietors of the store, Mr. Olin says (Graves' Rec., 545):

"The outside signs were never changed from Boies, Fay & Conkey to Fay & Conkey. There were signs that went the length of the building on Dearborn street; "Boies, Fay & Conkey" was on that side. There was a sign on South Water street the length of the building with 'Boies, Fay & Conkey.' I heard, during the fall of 1882, that the credit of the firm was impaired—the firm's city buyer told me he could not get goods around town on credit. We

were bothered and harassed about getting goods along not far from New Years. One lot they would not let me have at the Illinois Central depot about that time. In December I went to the cashier, Mr. Vaughan (Graves' Rec., 547), and told him I was owing my hired men some money, one as high as $300, and that there was a good deal of talk on the street in regard to the firm's credit, and I asked him to look out for me in case anything happened, and he said he would. On Saturday, January 20, 1883 (Graves' Rec., 546), William C. Sheldon (a brother-in-law (556) to Conkey), and the firm's receiving clerk (Graves' Rec., 555), told me after dinner he thought the game was up; that Mr. Fay's brother was there with a long string of names which appeared something like an assignment; they (Boies, Fay & Conkey) were indebted to me at that time $1,217 for hauling, and for the cash I lent Mr. Conkey, and the oats and feed I hauled to Mr. Fay's home the last two years. I went to the cashier, Mr. Vaughan, and asked for $300, and I said, here is eight men working for me, and a good many are poor and haven't anything to eat, and what am I going to do? Vaughan told me there was only a few dollars in the drawer. I went downstairs and was thinking where I could go and get some money. About 4 o'clock Vaughan came down and handed me $100 in currency and said (Graves' Rec., 547) it was every dollar there was in the house, and said that just came in.

Q. (Graves' Rec., 548.) How many men and teams did you have working under you for this firm? A. I had five double wagons and three single, two single trucks and a single pick-up wagon.

Q. How many men? A. When I ran them all I had eight. My work for September, 1882, amounted to $821.11, for October $887.65, (549) for November $724.11.

C. Q. (By Mr. FLOWER, Graves' Rec., 567.) Had your bills, as teamster for the house, always been paid promptly prior to the 1st of October? A. I never had any trouble in getting money there until after May, 1882.

MR. FAY PROCURING THE SIGNATURE OF OLIN, THE TEAMSTER, TO A NOTE.

Edward E. Olin further testified, as follows:

Q. (Graves' Rec., 570.) Have you, since your examination the other day thought of any additional circumstances relating to the financial condition of Boies, Fay & Conkey during the fall of 1882? A. Well, sir, there was a matter came up this spring (1883), that I was in hopes that I would never have to speak of, but it is coming out on the street, and I may as well state the fact in the case. Can I start and tell you the story through?

By Mr. FLOWER: That depends on circumstances, whether it is from Fay & Conkey.

By the WITNESS: That is a matter from Fay.

Q. (By Mr. MANNING.) Was it during the fall of 1882, Mr. Fay told you this? A. Yes, sir.

Q. Please state what was stated to you by Mr. Fay during the fall of 1882, and what you did? A. I went to the office for (on) some business, and I was in quite a hurry. Mr. Fay asked me to put my name down to a piece of paper. (Graves' Rec., 571.) I put it down. I think it was along, perhaps, in October, 1882.

Q. Was it a blank piece of paper? A. I do not know what it was. I was that much surprised. I do not know what it was.

Q. What has since transpired relating to that signing? A. The first thing I knew anything about the matter, I got a notice from the First National Bank (of Chicago)—

Q. Have you got that notice? A. No, sir.

Q. What become of that notice? A. I took it right over to Mr. Conkey and asked him what it meant—if he knew what that meant. He took it, and looked at it, and grabbed it up in his hands and tore it up and threw it on the floor and said, "It is nothing. Fred (meaning his son, then working for Bradford Hancock, receiver) has no business to send it to you."

Q. From your recollection what was that notice? A. It was a notice for a note $1,000 and some odd dollars due at a certain time against me.

Q. (Graves' Rec., 572) Have you had conversation since that time with reference to this pretended note, with the defendant Remy, and if so, state what was said between you? A. I went in and talked with Mr. Remy about my matter, and to wind up I think we did not exactly see alike in regard to Mr. Fay's and Mr. Conkey's treatment of me.

Q. What was said with reference to this note? A. It wound up with his telling me I had a note due at the bank.

Q. What did you tell him. A. I told him I thought it was a forgery.

Q. What did he then say, if anything? A. Told me to throw Fay into the lake; didn't care a damn what I did with him.

C. Q. (By Mr. FLOWER): Did you ever see the note you are speaking of? A. No, sir.

C. Q. Did you know that it was a note when you executed it? A. No sir.

C. Q. Have no knowledge upon the subject except the notice which was given, and what Mr. Remy told you? A. Yes, sir; I have; Mr. Boies told me the note was on the street being sold.

Q. (Graves' Rec., 573.) If it was a note that you signed at Mr. Fay's re-

quest, was there any consideration for it in any way, shape or manner? A. No, sir; never owed the firm a dollar in the world.

Mr. Conkey Procuring the Signature of John Smith, the Porter, to Notes.

Having shown the treatment Olin received from Boies, Fay & Conkey, and the devices resorted to for the purpose of raising money, we will now show how John Smith, the firm's porter, fared.

John Smith says (Graves' Rec., 574):

"For ten years prior to the failure, I was employed as a porter by Boies, Fay & Conkey—my salary was $50 per month; the firm owed me $76.67 when they failed. In the fall of 1882 Mr. Conkey came to me with some notes, and said: 'Mr. Smith, please sign this for me. It don't hurt you; you do me a favor.' In October and November, 1882, I signed two."

Q. Who asked you to sign them? A. Mr. Conkey.

Q. Did you know what it was you signed? A. No, sir.

Q. Do you know what amount it was you signed? A. No, sir.

Q. Did you ever owe the firm of Boies, Fay & Conklin (any) money? A. No, sir.

Q. Did you ever get anything from them for which these notes were given? A. Not a cent.

Q. Have you since heard that those notes you signed were out against you? A. I heard.

Q. Who told you? A. Mr. Boies; he asked me.

Q. (Graves' Rec., 575.) What did he tell you? A. He asked me if I signed some notes in the last months for the firm; I told him, yes, sir; I did. Mr. Conkey called me in the cigar room.

Q. What else did Mr. Boies tell you? A. He told me, if my property is between myself and my wife. Told him, yes, sir; it aint paid yet; was $800 mortgage on it at the same time, and I hadn't the money; had to borrow some to pay on the 1st of March.

Q. That is where you live? A. Yes. sir.

Q. How much is your place worth? A. It is worth, perhaps, $2,000.

Q. You owe $800 on it? A. Yes, sir.

Q. What, if anything, did he (Mr. Boies) tell you to do with your property? A. Make an assignment.

Mr. Gage knew about the Olin and Smith Notes.

Mr. Gage was examined about the notes of Olin and Smith and says:

"At the time Boies, Fay & Conkey's store was closed by the sheriff, the First National Bank held (Graves' Rec., 748) notes unpaid as follows: One against John Smith (the porter) for $1,046.16; another for $823.97; another for $871.93; and one against E. E. Olin (the teamster) for $1,047.13.

Q. (Graves' Rec., 748, to Mr. Gage.) Who is this John Smith? A. Heard he was a teamster or porter, and I forget which.

Q. Who is this Olin? A. I do not know who he is.

Q. Have you since learned who he is? A. I have heard he was a teamster or porter, but I do not know which.

Q. Have you made any effort to collect either of these? A. I can only say that we handed the paper to our attorney, and he has pronounced the Olinand Smith paper uncollectible.

Q. In whose possession is the Olin and Smith paper at this time? A. Possession of the bank."

Salesmen could not get their Salaries.

Andrew Hallen says (Graves' Rec., 581):

"I was during 1882 employed as salesman for Boies, Fay & Conkey. On November 1, 1882 (p. 582), the firm was indebted to me from $800 to $1,000. Every two or three days during October, November and December, 1882, and up to January 22, 1883, I tried to get the firm to pay me, and at last I found I could not get it at all, and I could get no pay the last three months I worked there. I would go and ask for money, and Duffy (another salesman) would, right after, go and ask for money—he could not get it. We were promised together on the same day, but never got it. On Friday previous to the failure Mr. Fay said to me, (p. 583) 'Whether I am present or not, Tom Vaughan will "give you a check next Tuesday for the money'; that would be the 23d, and the 22d they failed."

Mr. Hallen further says (Graves' Rec., 584):

"I remember the circumstance of Mr. Fay's going east soon after taking the August, 1882, inventory, and Mr. Graves was always at Mr. Fay's desk during the time Fay was away east. I saw him opening the mails the same as Mr. Fay."

D. O. DICKINSON, another salesman employed by the firm says (Graves' Rec., 585):

I remember Mr. Fay's going east in August, 1882. Mr. Graves occupied his desk. The financial standing of the firm among dealers in this city was very poor during the fall of 1882. Collectors had to run there time and time again to get their money—be put off and told to call again. William C. Richardson, the firm's city buyer told me (Graves' Rec., 586) of the firm's having difficulty in getting goods during the fall of 1882, and the employees had difficulty in getting pay for their services.

Q. Were you ever advised by either of your employers (prior) to the failure of the firm on January 22, 1883, that Julius K. Graves had previously withdrawn from the firm as a special partner? A. No, sir.

Q Did you learn it in any way or manner prior to the failure of the firm? A. No, sir.

WILLIAM C. SHELDON, the firm's receiving clerk for eleven years, and a brother-in-law of Mr. Conkey, testifies as follows (Graves' Rec., 588):

"I was employed by Boies, Fay & Conkey as receiving clerk up to the time of the failure on January 22, 1883.

Q. From the time Graves went in in March, 1882, up to the time of the failure, you were constantly in their employ? A. Yes, sir.

Q. Did you ever, prior to the day of the failure on January 22, 1883, hear, or were you told, by either member of the firm or any employee of theirs that Julius K. Graves had previously withdrawn from the firm? A. No, sir.

Q. How late, up to the time the store was closed in the forenoon of January 22, 1883, did you receive goods for and in behalf of the firm? A. Well, I received Monday morning up to within an hour.

Q. Were you at the store when the sheriff took possession? A. Yes, sir.

Q. Who delivered the possession of that store to the sheriff? A. Mr. Fay did—I delivered the keys to him that I had, and Mr. Fay handed them right to the sheriff or deputy sheriff."

THE FIRM UNABLE TO PAY THEIR CITY BILLS.

F. C. HANFORD, a clerk for P. C. Hanford & Co., says (Graves' Rec., 608):

"We sold oil and other things in our line to Boies, Fay & Conkey during the summer and fall of 1882. Not once during September, October, November and December, 1882, were their bills paid at maturity.

Q. Will you please state the way and manner, and as to the number of times you were required to call upon this firm to collect their bills as they became due during the fall of 1882? A. I used to call on an average every day—sometimes twice a day—only by the hardest work then I got my money out of them."

This witness further says (p. 610):

"I have a pretty general acquaintance here around the wholesale grocery trade. I knew a great many that had the same trouble that I did in getting money from the house. During the summer and fall of 1882 (p. 611) I had frequent interviews with Mr. Fay, the financial manager, relative to business matters connected with the firm.

Q. In any of these interviews you had with Mr. Fay, did he ever tell you, or intimate to you, that Julius K. Graves had withdrawn from the firm as special partner? A. He did not.

This witness further says (Graves' Rec., 613):

"When J. K. Graves went in (as special partner) his going in was largely advertised—never heard of his going out until the time of the failure.

C. Q. (From Mr. Flower): Now you have pretended to say you knew they were behind in their payment to other parties, as well as yourself, during that period of time. Do you know of that from any source except from the creditors they owed? A. From collectors I met in there, who said they had been there dozens of times for their money."

The Firm Asking for Extensions.

Samuel Faulkner testified in substance as follows (Graves' Rec., 614):

I am the Chicago manager for Proctor & Gamble, soap manufacturers, Cincinnati, Ohio. During October and November, 1882, Boies, Fay & Conkey was indebted to Proctor & Gamble for soaps and candles, and on the 24th of November, 1882, I had an interview with B. B. Fay, at which time he asked me for an extension of thirty days' time on the indebtedness of Boies, Fay & Conkey to Proctor & Gamble. To this I replied (p. 615): "I have no authority to grant extensions." Mr. Fay then said: "Will you kindly write to Cincinnati and ask as a favor that this paper be extended for thirty days? My reason for asking the request is that, on the first of December, we are to buy out Mr. Boies' interest."

Q. At that interview was anything said by Mr. Fay as to whether or not Julius K. Graves was going out of the firm? A. Nothing whatever.

Q. Did you ever, prior to the failure on January 22, 1883, hear anything to the effect that Graves had gone out of the firm of Boies, Fay & Conkey? A. No, sir.

The Firm unable to pay the Rent on their Store or their City Bills.

Mr. Vaughan says (Graves' Rec., 419, 420):

That when the firm failed, they owed rent on their stores for November and December, 1882, and for January, 1883.

George N. Holcroft testified in substance as follows (Graves' Rec., 616):

During 1882, I was agent for Leggett & Meyer Tobacco Company and Catlin Tobacco Company, both of St. Louis, and as such agent I sold goods on credit to Boies, Fay & Conkey in the fall of 1882—had been selling them for three or four years. Along (Graves' Rec., 617) in November, 1882, and before then, I experienced difficulty in making collections from them, and frequently had to go from six to ten times to make collections after their bills were due. During November, 1882 I took an order for goods from Mr. Fay for Boies, Fay & Conkey, and the next day after, declined to fill the order on the ground that the reports regarding the firm were unsatisfactory. (p. 618.) I then told Mr. Fay it was rumored there was a prospect of litigation among the individual members of the firm, regarding their dissolution, and that the houses I represented did not consider it safe to sell them goods except for cash, or with the personal guaranty of Mr. Graves, the special partner. This was on November 28, 1882. At that time Mr. Fay stated to me that on December 1st there would be a new firm—that Mr. Boies would retire, and that it was not then determined whether or not Mr. Conkey would remain in the firm. Mr. Fay further said (Graves' Rec., 619) he had sold some real estate to his brother-in-law (meaning the Humboldt Boulevard property conveyed by him to Rufus E. Graves on October 21, 1882) and that out of the proceeds of that sale he would pay Boies for his interest and have something left, which would be added to the capital of the new firm.

Q. Suppose, Mr. Holcroft, it had been told to you at that time by Mr. Fay that in October, previous to your interview with him, that the special partner Julius K. Graves and William A. Boies, together with other members of the firm had agreed upon a secret dissolution of the firm, and had actually signed dissolution papers, which they were purposely keeping from the public and from their creditors, and that there was no responsibility to this pretended new

firm, except the responsibility of Fay and Conkey, would you then have taken any orders from this firm, or sold them any goods on credit? A. Would not have sold them a nickel's worth.

Q. In all the interviews you say you had with Mr. Fay, did he ever tell you at any time that Julius K. Graves, the special partner had withdrawn from the firm? A. Never. He always represented that Graves was still a member, and was willing to back them outside of his special partnership.

J. L. DOBBS testified in substance as follows (Graves' Rec., 620):

I am the western agent for Arbuckle Bros., New York, who are dealers in coffee and sell to wholesale dealers. During 1882 I sold goods on credit to Boies, Fay & Conkey for Arbuckle Bros.

Q. Were you ever as a creditor, or as an agent of a creditor, notified in any way or manner of the withdrawal of Julius K. Graves, as special partner of that firm, prior to their failure on January 22, 1883? A. I never knew of his withdrawal even then or any other time; did not know to this day he had withdrawn.

Mr. Fay (Graves' Rec., 991) is shown an original order taken by one of the salesmen in the name of Boies, Fay & Conkey on January 20, 1883, (the day Fay & Conkey signed $40,000 judgment note in favor of First National Bank) for goods to be shipped to Walters and Cooper, Michigan City, Indiana, and he (Fay) admits that is the printed form for order in use up to the day the firm failed.

On page 993 (Graves' Record) a letter is shown, dated January 15, 1883, to George Lobdell, Fowler, Indiana, signed by Boies, Fay & Conkey, asking him to remit for a bill sold on December 16, 1882.

SAMUEL B. RAYMOND testified in substance as follows (Graves' Rec., 631):

I am a sugar broker. In 1882 I had dealings with Boies, Fay & Conkey. The sugar refineries I then represented were (page 634) Harrison, Havemeyer & Co. of Philadelphia; Bay State Sugar Refining Company, of Boston; May, Jane & Co., of Freeport; Davenport Glucose Manufacturing Company, of Davenport, Iowa; Peoria Grape Sugar Company, of Peoria, Illinois; Iowa City Grape Sugar Company, of Iowa City; Michigan Grape Sugar Company;

J. A. Cunningham, Danville, Illinois; Geneva Grape Sugar Company, of Geneva, Illinois. At the time of their failure, Boies, Fay & Conkey owed me for my different institutions, about $23,000.

Q. (p. 632.) Which one of the members of the firm usually bought the goods from you, Mr. Raymond? A. Fay; he usually bought them; for a long time before he failed I avoided him. We felt suspicious of him for a very long time; for more than three or four months.

Q. You knew of their standing and credit during the fall of 1882? A. I knew in a general way.

Q. What was it among the trade? A. It was not good; some people had a great deal of confidence in them, but the majority had little or none. Their credit in a general way was not good.

E. R. NICHOLS testified in substance as follows (Graves' Rec., 643):

I am a commission merchant at 159 South Water street, Chicago. On the 10th of January, 1883, I sold on credit to Boies, Fay & Conkey fifteen barrels of corn meal. The bill was made out in the name of Boies, Fay & Conkey, and delivered with the goods. The bill has never been paid, and now stands on my books charged to Boies, Fay & Conkey.

HENRY E. SEELEY testified in substance as follows (Graves' Rec., 656):

I have been an attorney in Chicago for thirty years. In January, 1883 I brought two replevin suits against Boies, Fay & Conkey and the Sheriff. In one suit—Eppens *et al*—we replevined $1,150 worth of goods, and afterwards I settled this case with Flower, Remy & Gregory, by paying them $550 cash, which we estimated was fifty per cent. of the value of the goods taken.

Q. (Graves' Rec., 657.) What was said at the time the settlement was effected, with reference to its being made known to other creditors, if anything? A. I do not remember the express language that was used, but there was something said about keeping it quiet, not having it known to others; that no handle of this was to be made in effecting a settlement with others.

C. Q. By Mr. Flower (p. 657.) The goods which were taken on replevin were taken from the possession of the sheriff, were they not? A. Yes.

C. Q. Who held them under executions in favor of the First National Bank and other creditors? A. Yes, sir.

Sale of Boies, Fay & Conkey Notes by Beveridge & Dewey.

David B. Dewey testified in substance as follows (Graves' Rec., 685):

I am a member of the firm of Beveridge & Dewey, bankers and brokers in Chicago. During 1882 we did business with Boies, Fay & Conkey.

Q. Sold the firm's paper? A. Yes sir. Sold Boies, Fay & Conkey's paper.

Q. The notes of the firm? A. The notes of the firm.

Q. Please explain how you negotiated the sale of the firm's paper during October, 1882? A. By offering to sundry buyers, and through eastern correspondents.

Q. (Graves' Rec., 688): How much of Boies, Fay & Conkey's paper did the firm of Beveridge & Dewey sell after August 22, 1882—giving the gross amount? A. $45,323.50.

Q. (p. 689.) How much, if any, Fay & Conkey paper, did Beveridge & Dewey sell during the year 1882? A. We sold none—I am safe in saying that the paper of Fay & Conkey would not sell.

Q. (Graves' Rec., 690): About how much paper of Boies, Fay & Conkey's did you have, that was returned to them, and not sold by your firm? A. I think it's about $25,000.

Q. At how late a date did you sell or get returns of sales of the Boies, Fay & Conkey paper? A. We made a return sales of one piece of Boies, Fay & Conkey's paper on January 13, 1883.

(Account sales of this note is shown on page 908 of Graves' record.)

Q. Give the amount and date? A. The amount of $2,061.91, dated November 16, 1882, due March 19, 1883. * * *

Q. (Graves' Rec., 691.) When did you receive that note from Boies, Fay & Conkey? A. November 21, 1882.

We will here call attention to the fact that the note last referred to was proved up in this case, by the First National Bank of Webster, Massachusetts (Bank Rec., 70), and allowed by the master, as a claim against the limited partnership. The note reads as follows:

$2,061.91. CHICAGO, November 16th, 1882.

Four months after date we promise to pay to the order of ourselves Two Thousand, Sixty-one and 91/100 Dollars, at the Importers and Traders National Bank of New York. Value Received.

BOIES, FAY & CONKEY.

Endorsed: Boies, Fay & Conkey.

Q. (To Mr. Dewey, Graves' Rec., 707.) That piece of paper, $2,061.91, was among those delivered to Beveridge & Dewey on November 21, 1882 was it not? A. Yes.

Q. (Graves' Rec., 691.) Are the two notes (now) shown you, dated at Chicago, October 30, 1882, one for the sum of $1,734.21, at ninety days after date, and the other for $2,016.92, payable in four months after date, both signed by Boies, Fay & Conkey, and endorsed by Boies, Fay & Conkey, paper which was sold through Beveridge & Dewey? A. I can identify these notes as notes that passed through our office.

The two notes last mentioned are the ones owned by the complainant, Corbin, and on which the original suit was brought. The account sales rendered to Boies, Fay & Conkey, from sales of these two notes, by Beveridge & Dewey are shown (Graves' Rec., 908), from which it appears that the note for $1,734.21 was sold November 28, 1882, and the other on December 8, 1882.

Q. (To Mr. Dewey, Graves' Rec., 691.) When were they sold? A. The proceeds were credited to Boies, Fay & Conkey on November 28th in reference to the $1,734.21 note and on December 8th in reference to the $2,016.92.

Q. By whom were those notes sold for your firm? A. I will answer the question by saying, all, on or about that date, of the Boies, Fay & Conkey notes were sold by eastern correspondents either in New York or Boston, but to whom sold I cannot state.

Q. Who was your New York correspondent at that time? A. Platt & Woodward.

Q. (Page 692.) Who was your Boston correspondent at that time. A. We had three, Pinkham & Corey, Lawrence Potter & Co. and Rogers, Wood, Loring & Co.

Q. After August, 1882, were all these firms selling Boies, Fay & Conkey paper for Beveridge & Dewey, or trying to sell it? A. I presume they were.

Q. Did the firm of Beveridge & Dewey represent these three pieces of paper as being merchandise paper? A. No, sir; no representation made whatever.

Q. Why was it that the amounts in each instance were given in odd dollars and cents? A. I cannot state that specifically.

Q. Then, if I understand you, after August, 1882, the firm of Beveridge & Dewey had an assortment of this paper on hand for sale, and these several parties in New York and Boston, about whom you have testified, held Boies, Fay & Conkey paper on consignment from Beveridge & Dewey, which they offered for sale? A. We offered the paper for sale through them.

Q. But you consigned the paper to them, did you not? A. Yes.

Q. Remitting it in a letter to them? A. Remitted it by express to them, yes, sir; letter or express.

Q. For sale on the market? A. For sale.

C, Q. (Graves' Rec., 909.) Will you please look at the account sales and tell me the amount of the paper of the limited partnership of Boies, Fay & Conkey which was sold by Beveridge & Dewey for them between October 17, 1882, and December 2, 1882? A. $42,074.68.

C. Q. (Graves' Rec., 701.) From what member of the firm did you receive that paper in November? A. Must have been received from Mr. Fay, as he was in the habit of delivering paper here.

C. Q. Was anything said at the time of this delivery on the 21st of November, 1882, by Fay, that in October preceding, Boies and Graves had gone out of the firm? A. No, sir; not a word.

C. Q. (p. 702.) Was there any intimation to that effect? A. No, sir.

C. Q. Had you known there was any such secret arrangement during October preceding, between Boies, Fay & Conkey and Graves, would you have received that paper and offered it for sale on the market? A. No, sir.

C. Q. (Graves' Rec., 707.) You knew, did you, Mr. Dewey, during the year 1882, of the firm of Boies, Fay & Conkey, as that of a lim'ted partnership, with Julius K. Graves as the special partner, did you not? A. Yes, sir.

C. Q. And this paper you received and sold as the paper of that firm, did you not? A. Yes, sir.

Mr. FAY testified as follows (Graves' Rec., 277):

Q. Mr. Fay, can you tell me how late a date you issued paper in behalf of the firm prior to the failure of January 22, 1883? A. The firm of Boies, Fay & Conkey?

Q. Yes, sir. A. Up to, I think, in December.

Q. (Graves' Rec., 278). Didn't you issue some after January 1, 1883, in the name of Boies, Fay & Conkey? A. Well, perhaps we did * * *

W. H. STEVENS testified in substance as follows (Bank Rec., 74):

I am agent for the Anchor Milling Company of St. Louis. In the fall of

1882 and winter of 1883, the Anchor Milling Company sold flour in car-load lots to Boies, Fay & Conkey, and the amount now due our company from Boies, Fay & Conkey is (p. 73) in three notes, one dated December 20, 1882, one dated January 9, 1883, and another dated January 15, 1883, in all amounting to $2,042.63.

Q. I will ask you if either you or the Anchor Milling Company were ever advised in any way or manner, prior to January 22, 1883, of the withdrawal, or the pretended withdrawal of Julius K. Graves (as) special partner in this firm? A. Never had any such knowledge, information, or intimation.

Q. Did you, or not, rely upon the responsibility of Mr. Graves being in there as the basis of the credit given? A. We did, most emphatically.

Q. Would this amount of credit have been given had you known of his withdrawal or pretended withdrawal from the firm at that time? A. It would not.

George E. Johnson testified as follows (Bank Rec., 71–2):

Q. It appears by the testimony of the witness, Kistner, that in October, 1882, you had a note for $5,000 against this firm (of Boies, Fay & Conkey), in one note, and that on December 13th, that loan was renewed by two $2,500 notes. Will you explain that to the court, please? A. I will say that the sixty days' note that was given to me in October, when it matured, I called upon Mr. Fay for the payment, and he kept putting me off from day to day, saying that if I would come in to-morrow, or three or four days hence, that he would give me the money, and the thing ran along until in the early part of January, and I then called upon him peremptorily to pay the money, and told him I needed it. He begged of me, as he had a good deal of money to pay, to take two notes of $2,500 in renewal of the loan. He paid me the interest and I took the two notes for $2,500 each, one for sixty days and one for sixty-five, I think.

By the master: The original loan was to the firm of Boies, Fay & Conkey?

A. Yes, sir; with Mr. Graves' name on the back as endorser.

Q. By Mr. Manning (Bank Rec., 72). At the time of this renewal which you say was in the early part of January, did Mr. Fay tell you, or give you to understand in any way or manner, that at that time Mr. Graves had withdrawn from this firm? A. He did not.

Q. Did you know that he had withdrawn, or had pretended to withdraw, prior to the failure? A. I did not; didn't know it till after the failure.

Q. (Graves' Rec., 776.) Mr. Johnson, suppose Mr. Fay, at that time had told you that in October preceding Julius K. Graves, by an arrangement be-

tween himself, and Boies, Fay & Conkey, had entered into a secret dissolution of the firm, under and by which J. K. Graves withdrew, would you then have consented to an extension of time after the maturity of your note? A. I should not.

In view of the fact that Benjamin B. Fay and Lucius W. Conkey on January 22, 1883, confessed a judgment (page 154) in favor of this Mr. Johnson for $5,000, and that Flower, Remy & Gregory included therein $250 attorney's fees for themselves for entering the judgment, without any authority so to do from Mr. Johnson, and in view of the fact that Flower, Remy & Gregory placed the execution issued on such confessed judgment in the hands of the sheriff in point of time so that the First National Bank of Chicago, and Julius K. Graves, would be paid in full, on the judgments confessed in their favor, and Johnson would get nothing, the court below is sustained in its finding. (Graves, Rec., 155.)

"That said judgments were confessed to prefer certain creditors, but chiefly to save said Graves from loss on account of said partnership, and on account of liability incurred by him on commercial paper made by or on behalf of said limited partnership."

On the question of the authority for B. B. Fay and L. W. Conkey executing on January 22, 1883, a judgment note in favor of Mr. Johnson, and of Flower, Remy & Gregory entering judgment thereon, Mr. Johnson testified as follows (Graves' Rec., 773):

Q. Did you ever authorize or direct Benjamin B. Fay or Lucius W. Conkey on or about January 22, 1883, to confess a judgment in your favor for the amount of that note? A. I did not.

Q. Did you ever authorize the law firm of Flower, Remy & Gregory to enter a judgment by confession in your favor against Benjamin B. Fay and Lucius W. Conkey for the $5,000 indebtedness which you say you held against the limited partnership of Boies, Fay & Conkey? A. I did not.

Q. Did you ever authorize or direct the law firm of Flower, Remy & Gregory to file an answer for you in this suit now pending between *Corbin* v. *Boies and others*? A. No, sir; I never did, sir.

The answer filed by Flower, Remy & Gregory for Mr. Johnson is shown in Graves' record, 64, in which they made him say (page 65), that he claims nothing against the limited partnership.

The First National Bank and Graves Executions Delivered to the Sheriff by Mr. Remy.

By reference to the several executions issued on the judgments confessed in the Superior court of Cook county, on January 22, 1883, we find that Mr. Remy delivered them to the sheriff in point of time, as follows: The execution for $42,000 in favor of the First National Bank of Chicago, at 10:50 o'clock A. M. (Graves' Rec., 264.) The execution for $18,382.50 in favor of Julius K. Graves at 10:55 o'clock A. M. (Graves' Rec., 813.) The execution in favor of John H. Lull for $2,632.50 at 11 o'clock A. M., and the execution in favor of George E. Johnson for $5,257.50 at 11:05 o'clock A. M.

James H. Burke, the deputy sheriff who levied the several executions on the stock of merchandise of Boies, Fay & Conkey, testified as follows (Graves' Rec., 814):

Q. Did Mr. Remy deliver them (the executions) to the sheriff's office? A. Yes, sir; one at a time.

Q. And in the order you have named? A. And in the order.

Q. Were you accompanied by either of the plaintiff's attorneys, or anybody from their office, when this levy was made? A. Mr. Remy—C. H. Remy of the firm of Flower, Remy & Gregory.

Q. Went to the store with you? A. Yes, sir, and directed the sheriff to go ahead and levy on that stock of goods.

Q. (Graves' Rec., 811.) Can you give the amount for which the goods were sold? A. The amount of the sale—the gross amount—$54,806.52.

Q. I would like to know the number of dollars paid under these writs to the First National Bank or its attorneys? A. The bank got $42,231.50, that being the amount of the execution and interest.

Q. How much did Julius K. Graves get? A. Julius K. Graves got $9,791.18."

Having now shown that the entire stock of goods of the firm, or such portion thereof as Mr. Fay saw fit to have levied upon by the sheriff, brought only $54,806.52, and that the First National Bank of Chicago and the special partner, J. K. Graves, got the whole of the money (except the sheriff's fees), let us briefly examine as to the *bona fides* of this John H. Lull judgment, which, in point of time as to delivery of executions, stands ahead of Johnson's, and then see if there is any other conclusion to arrive at than that it was planned by J. K. Graves and Remy, that Mr. Johnson would be beguiled into ratifying the judgment confessed by Fay & Conkey in his favor, under the supposition that he would be paid the amount of his claim from proceeds of sales by the sheriff, and by such ratification, release his claim against Graves and the limited partnership.

It appears that it occurred to Graves, or Fay, or Remy, that possibly the firm goods might bring enough at the sheriff's sale to more than pay the First National Bank and the Graves' executions in full, and so they conceived the idea of placing a small judgment in favor of John H. Lull, ahead of Johnson's, to catch any excess there might possibly be.

On September 22, 1883, Mr. Fay testified in regard to the Lull judgment, as follows:

Q. (Graves' Rec., 303.) Who is John H. Lull? A. He is a gentleman that lives in Dubuque; he is in the bank there.

C. Q. (By Mr. FLOWER, Graves' Rec., 335.) Your attention was also called to an entry on the journal in favor of a lawyer connected with some bank at Dubuque; do you know for what purpose that note was given and that judgment confessed? A. What was the amount?

C. Q. $2,500? A. It was for legal services.

C. Q. Was it for the purpose of protecting and paying the two drafts which you have mentioned, drawn by your firm on J. K. Graves? A. It was.

Three days later (September 25, 1883) Mr. Fay was again examined about the Lull judgment:

Q. (Graves' Rec., 350.) Who asked you to sign a note in favor of John H. Lull? A. Mr. Graves.

Q. To whom did you deliver it? A. I think Mr. Remy took it.

Q. Did your firm owe Mr. Lull anything at that time?

(Objected to by Mr. Flower.)

A. I do not know whether this money was Mr. Lull's or the bank's.

Q. Did your firm on the 22d of January owe any money to John H. Lull? A. We had money from that bank, but I cannot state whether the money was the bank's or Mr. Lull's.

Q. And by your answer, you mean to evade or equivocate? A. I do not mean to evade or equivocate in answering.

Q. Will you please tell me, if you know, whether on the 22d of January, 1883, the firm of Boies, Fay & Conkey, or Fay & Conkey, owed any money to John H. Lull? A. John H. Lull's name did not appear on our books.

Q. Did your firm, or either of them, owe any money to John H. Lull on the 22d of January, 1883? A. Indirectly.

Mr. Remy was asked on March 28, 1884, about the Lull judgment, and he testified as follows (Graves' Rec,, 820):

Q. (By Mr. Flower) Do you know anything about the Lull judgment? A. There was a judgment entered in the name of John H. Lull, the note was prepared at the suggestion of Mr. Graves. He stated that he thought Mr. Lull held a piece of paper signed by the defendants, and endorsed by him—

Q. Well, what was the fact about it? A. Personally, I do not know what the facts are. I have been informed by Mr. Graves that he was mistaken; that Mr. Lull had no such paper.

Julius K. Graves testified on December 20, 1883, about the Lull judgment, in substance as follows (Graves' Rec., 361):

Q. Did you know of the entry by confession of a judgment in John H. Lull's favor in the Superior court of Cook county by Fay & Conkey on January 22, 1883? A. I know of a judgment being entered.

Q. By whose direction was that judgment entered, if you know? A. I asked that it be entered. I then believed that Mr. Lull had $2,500 of their paper bearing my endorsement. On returning to Dubuque, I at once saw Mr. Lull. I found that he had no such paper. I communicated the fact to Flower, Remy & Gregory, my attorneys, and that no claim therefor should be made under that judgment.

Q. How soon after being here (Chicago) on the 22d of January did you return to Dubuque, and ascertain the facts as you have stated? A. I should say within three or four days.

Q. And how soon thereafter did you communicate with your attorneys with reference to it? A. I think it was within a week following.

Assuming this statement of Julius K. Graves in regard to the Lull judgment to be true, and then knowing as Mr. Remy says he did, that there was no consideration for the Lull judgment, will Mr. Flower be able to satisfactorily explain why his firm, on July 2, 1883, (nearly six months after Graves had told them to make no claim under the Lull judgment) had the audacity to file an answer in this case for John H. Lull and say for him and for George E. Johnson and Mary Murison, as they did in that answer. (Graves' Rec., 65).

"That the judgment notes so executed (by Fay & Conkey) and delivered to them, were taken in good faith—as security for an existing indebtedness, without knowledge of any fraud or contemplated fraud upon the part of the makers, or any scheme or contrivance existing between the makers of said notes and William A. Boies and Julius K. Graves"?

The judgment by confession in favor of Mary Murison was entered against Fay & Conkey by Flower, Remy & Gregory, and the testimony in regard to this confession is in substance as follows:

GEORGE W. MURISON says (Graves' Rec., 776.):

I am a son of Mary Murison, and since my father's death have looked after her business. During the year 1882, Boies, Fay & Conkey were indebted to my mother $1,500 for money loaned for which she held a note signed "Boies, Fay & Conkey." I heard of the failure of this firm the day the store was closed by the sheriff. Neither my mother or myself knew anything about Fay & Conkey executing a judgment note in favor of my mother, prior to the entry of the judgment thereon, (p. 777) and neither of us ever directed the entry of the judgment on that note.

Q. Did you or your mother ever employ the firm of Flower, Remy & Gregory to enter up judgment on such a note? A. No, sir.

Q. (Graves' Rec., 778.) Did you or your mother ever direct the firm of Flower, Remy & Gregory to file an answer in this pending suit of *Corbin* v. *Boies, Fay & Conkey*? A. No, sir; never engaged them in any way, professionally or otherwise."

This witness further says (p. 779):

"I told Mr. Remy in May, 1883 (two months before the answer was filed) that I never engaged him as counsel, and if he considered himself so employed, I wished there and then to cancel all work on this matter, as far as he was concerned, and that I should be privileged to go to court and get a judgment and turn it over to any lawyer I saw fit to."

Notwithstanding all these facts and these spirited interviews, Flower, Remy & Gregory on July 2, 1883 (Graves' Rec., 64-5), filed in the court below an answer for Mary Murison, in which answer they say, for her, in effect, that her claim is against B. B. Fay and L. W. Conkey, and that she has no claim against Graves or the limited partnership.

B. B. Fay conveys the firm's Humboldt Boulevard real estate.

There was still another transaction carried through by B. B. Fay and J. K. Graves, the appellant, during October, 1882, which tends to confirm the theory that these two men were, subsequent to August, 1882, concocting and carrying out a scheme to defraud the merchandise creditors of Boies, Fay & Conkey. During the examination of the firm's private ledger in the fall of 1883 by the expert accountant, Mr. Weinschenk, the fact was disclosed for the first time that at the time of taking the August, 1882, inventory, the limited partnership owned and took into account as a part of its assets, an undivided one-half of ten acres of very valuable land fronting on one of the boulevards in Chicago, and that the title to this land was held in trust by Mr. Fay for the firm. Mr. Vaughan testified in reference to this real estate as follows (Graves' Rec., 434):

Q. In making the statement for the firm after taking the inventory of the first of January, 1882, and the inventory in August, 1882—in that statement, did you take into account the inventory of real estate shown on page 66 of the firm's private ledger? A. I did.

Q. To what amount? A. $24,338.74—it shows under (account of)—"Humboldt Park Boulevard."

Q. As assets of the firm? A. As assets of the firm.

Q. Did it also show in the statement for the firm that you made on December 31, 1882? A. Yes, sir.

Q. Which statement you say, was delivered to Mr. Fay, and by his statement to you, his copy given to Julius K. Graves, and a second one made for Mr. Fay; is that correct? A. Yes, sir; that is correct; that is the last inventory.

C. Q. (Graves' Rec., 434 by Mr. Flower.) Did you know, Mr. Vaughan, or were you ever informed by any member of the firm, prior to the failure, that that real estate had been conveyed to Rufus E. Graves, of Dubuque? A. No, sir.

C. Q. And it nowhere appears upon the book? A. No, sir.

C. Q. Consequently in making up that statement you included that as assets? A. Yes, sir.

On November 5, 1883, after learning the facts about this real estate belonging to the limited partnership, the complainant Corbin, in behalf of himself and other creditors, filed a supplemental bill against Rufus E. Graves, a brother of Julius K. Graves (Graves' Rec., 90–94), Rufus E. being then the president of the Commercial National Bank of Dubuque, and Julius K. one of its stockholders and a director.

The deed from B. B. Fay and wife to Rufus E. Graves conveying this real estate is dated October 21, 1882 (two days after the last pretended dissolution notice was signed).

JULIUS K. GRAVES testified at two different times in relation to this conveyance of real estate—at one time he testified as follows (Graves' Rec., 228):

Q. By Mr. REMY: Have you any knowledge concerning the giving of a deed about October 1, 1882, by the defendant, B. B. Fay, to Rufus E. Graves: if so, state the circumstances under which that deed was made? A. I have; I was endorsing for Mr. Fay and his firm, and I received the deed; it was made to my brother, Rufus E. Graves, as collateral for any endorsement that I made.

Q. (Graves' Rec., 229.) What has become of those endorsements; have they been protected and paid and extinguished, or otherwise? A. They have been paid and extinguished.

Q. Do you know whether Rufus E. Graves at the presont time has any claim to this land, or asserts any as against Fay? A. He does not, to my knowledge.

Q. What is the financial condition of Mr. Fay at the present time? A. It is one of utter and hopeless insolvency.

When Graves gave this testimony he evidently desired to have the proceeds from a sale of this real estate apply on his individual notes, held by J. W. Doane & Co.—the other time when he testified he doubtless desired to defeat a recovery under the complainant Corbin's supplemental bill. The second time J. K. Graves testified about this real estate he was examined by Mr. Flower as follows (Graves' Rec., 1,036):

Q. Do you know anything about any real estate held by Mr. Fay in his own name which was conveyed to Rufus E. Graves in the fall of 1882? A. Yes, sir.

Q. Will you tell what there was of that transaction? A. Mr. Fay mentioned the matter to me as a piece of real estate on what he called the North side of Chicago—

Q. By Mr. MANNING: When was that, Mr. Graves, if you please? A. I think it was in October.

Q. After signing those (dissolution) papers, about that time? A. I do not recall the date.

By the WITNESS:—which he (Fay) thought was worth a good deal of money, probably $20,000. I told him that he ought to sell it and use the money in their business. I suggested that they make a deed of it to my brother, R. E. Graves, who should hold it: *First*, as a collateral for anything which might be due him, or the Commercial National Bank from the firm, and that I would sell the property for the most it was worth—most it would bring—and under their approval, and account to them for the proceeds. They executed a deed conveying the property to R. E. Graves.

Q. What disposition was made of the property? A. It stands in that shape, except that I think my brother borrowed some money on it, from an eastern party—it may be $12,000; I do not recall the amount.

To show what became of the title to this valuable real estate, we will call attention to Rufus E. Graves' testimony (Graves' Rec., 1,014), where he says:

I have been president of the Commercial National Bank of Dubuque for thirteen years.

Q. (By Mr. FLOWER.) Do you recollect receiving, during the fall of 1882, a conveyance from Benjamin B. Fay and wife, of Chicago, to you of some land in Chicago? A. I do.

Q. Who handed you the deed? A. J. K. Graves.

Q. State whether or not you transferred the land to any one, and if so, who? A. I have transferred it to [my brother-in-law, p. 1,017] George H. Tilden, of Keene, New Hampshire.

Q. Did you inform him of the circumstances under which you held it? A. I did not.

Cross-Examination by Mr. Manning.

C. Q. (Graves' Rec., 1,017.) Did you procure the assent of Fay and Conkey before you did that? A. I did not.

C. Q. (Graves' Rec., 1,019.) Now I ask you—while so holding the title in trust—why did you convey it, without their consent, to George H. Tilden? A. I had nothing to do with them.

C. Q. Will you please answer the question? A. I have answered it.

C. Q. Why did you do it? A. I have nothing to do with them; never had anything to do with them. I got it from J. K. Graves; I hadn't anything to do with Fay and Conkey; never had.

C. Q. Did you ever obtain the consent of either Fay and Conkey, Boies, Fay & Conkey or Julius K. Graves, to convey this property to George H. Tilden? A. I think I told J. K. Graves—asked him if there was any objection to my using that.

C. Q. What was his reply? A. I cannot state.

C. Q. State the substance of it, if you please? A. The substance—there was no objection.

C. Q. (Graves' Rec., 1,020.) Did you know anything about an entry of judgment in the United States Circuit court for the Northern district of Illinois, for the sum of $14,962.50, in favor of the Commercial National Bank, of Dubuque, until after 22d of January, 1883. A. I do not remember dates.

C. Q. How did you first learn of the fact, and from whom, that such a judgment had been entered? A. I think from J. K. Graves.

C. Q. (Graves' Rec., 1,021.) Did the Commercial National Bank of Dubuque ever authorize Flower, Remy & Gregory to enter judgment on January 22, 1883, against Fay and Conkey in the United States Circuit court for the Northern district of Illinois? A. I think J. K. Graves was the one who directed that for the bank.

C. Q. Did you ever direct Flower, Remy & Gregory to file an answer for you with reference to this real estate? A. I do not remember.

Q. (Graves' Rec., 1,016.) Did your brother ever advise you, during December, 1882, he had gone out of that firm? A. I do not remember.

Q. (Graves' Rec., 1,025, by Mr. Flower.) Did you know at the time that you discounted the Fay & Conkey paper (December 6, 1882) that Mr. Graves himself had retired from the firm? A. No, sir.

Mr. Flower, evidently being surprised at such reply, again asked the witness the following leading question:

Q. In December, 1882, at the time that the paper was running in the name of Fay & Conkey instead of Boies, Fay & Conkey, did you know that Mr. Graves at that time had ceased to be a limited partner of the firm? A. I do not know that I had any information in regard to it.

The answer of Rufus E. Graves to the supplemental bill was filed by Flower, Remy & Gregory, January 10, 1884, (Graves' Rec., 100), in which they say:

That said George H. Tilden is now the actual and *bona fide* holder of said property without notice of any equities of the complainant (Corbin), or any of the creditors of Boies, Fay & Conkey.

Boies, Fay & Conkey notes secretly given J. K. Graves.

Having now shown the daily pledging of goods by Boies, Fay & Conkey to the First National Bank of Chicago from October 6 to 18, 1882—having shown the fraudulent and secret signing of three pretended dissolution papers on October 17 and 19, 1882 (except J. K. Graves says he told Mr. Gage about them)—having shown the fraudulent conveyance by Fay to Rufus E. Graves of the real estate belonging to the limited partnership by his deed dated October 21, 1882—having shown the placing of $40,000 or $50,000 worth of the limited partnership paper in the hands of Beveridge & Dewey for sale in New York and Boston, we will now show that on October 20, 1882, some of the limited partnership paper was secretly and fraudulently issued and delivered to J. K. Graves without any consideration—without its being entered on the firm books—and, strange to say, issued unbeknown to Mr. Vaughan, the head book-keeper and cashier.

During the examination of Mr. Vaughan he was interrogated as follows:

Q. (Graves' Rec., 449.) I now show you a note dated October 20, 1882, for $5,000, payable in ninety days after date to the order of ourselves and signed Boies, Fay & Conkey, with the indorsements on the back of Boies, Fay & Conkey and J. K. Graves erased, will you please show me where that note is entered on the bills payable book now before you? A. I do not find it there at all, sir.

Q. Did you ever see that note before? A. No, sir, I never did.

Q. Do you know what that was given for? A. I do not.

Q. Do you know whether there was any consideration for that note? A. I do not know anything about it.

Q. Which one of the members of the firm signed that note, if you know? A. Mr. Fay signed it.

Q. Which one of the members of the firm indorsed it? A. Mr. Fay.

Q. Is that the genuine signature of J. K. Graves on the back of it? A. I should say it was.

This mysterious note fell due on that memorable day, January 20, 1883, when Benjamin B. Fay and Lucius W. Conkey decided to confess judgments in favor of their special partner, Julius K. Graves, and the First National Bank of Chicago.

Who held this fraudulent secretly signed note at its maturity! Let us further examine the record.

During the examination of Mr. Dewey, he was interrogated as follows (Graves' Rec., 913):

C. Q. Is the note I now show you, dated Chicago, October 20, 1882, signed Boies, Fay & Conkey for $5,000, payable ninety days after date, endorsed Boies, Fay & Conkey, and J. K. Graves, and made a part of Vaughan's deposition, one of the notes that was renewed to Beveridge & Dewey on January 20, 1883? A. It's renewed by Fay & Conkey—the note is endorsed by J. K. Graves.

C. Q. Was J. K. Graves and Fay in Beveridge & Dewey's office on that 20th of January? A. Yes, sir.

C. Q. And that is the date you gave them a check for $7,000, was it not? A. That is my recollection.

C. Q. Did either J. K. Graves or Benjamin B. Fay on that day, when they were renewing this paper, and when they procured the $7,000 of you, give you any intimation that on that same day they had already signed three or four judgment notes amounting to about $75,000, and that they had ordered

Flower, Remy & Gregory, and other attorneys, to prepare about $125,000 more to be signed early on Monday morning following? A. No, sir.

C. Q. Did they, or either of them, give you any intimation but that the loan was made in good faith for the purpose of continuing the business of the firm? A. No, sir.

The Firm Books show no change in Ownership of Assets.

Let us now examine the record and ascertain what, if anything, is shown about a change of ownership of the assets, or about a dissolution of partnership by the books of account kept by Boies, Fay & Conkey.

Mr. Kistner, the city book-keeper, testified as follows (Bank Rec., 71):

Q. Mr. Kistner, will you please examine the book now before you entitled "City Ledger C — B. F. & C."—and state to the court, what book that is, if you know? A. City ledger "C" of the firm of Boies, Fay & Conkey.

Q. Does that book purport to show the amount of indebtedness from the firm of Boies, Fay & Conkey, to their creditors from, say, July, 1882, to January 22, 1883? A. It does.

Q. Is there any way to designate by the books of this firm, by any entries that were made prior to January 22, 1883, that this firm at any time changed from Boies, Fay & Conkey, to Fay & Conkey? A. Not to my knowledge.

Q. (Bank Rec., 75). Is there any way to tell by the accounts in that city ledger "C," or by the bills payable book when, if ever, the firm of Boies, Fay & Conkey ceased doing business, and Fay & Conkey began? A. No, sir.

Q. The account appears to be carried continuously, does it? A. Yes, sir.

Q. From what date to what date? A. From June, 1882, to January, 1883, without a break.

Mr. Weinschenk the expert book-keeper who examined the firm's books, says (Graves' Rec., 461):

There are no entries on the journals or any other books of Boies, Fay & Conkey, or Fay & Conkey to indicate any change in the membership of the firm during October, November and December, 1882, or January, 1883.

Daniel Lynch, one of the buyers for Boies, Fay & Conkey, testified as follows (Graves' Rec., 503):

Q. You were subpoenaed were you not? A. Yes, sir.

Q. Why didn't you come? A. Hadn't time.

Q. Did you consult with any one (as to) whether you should come or not, yesterday? A. Yes.

Q. Who? A. I handed the subpoena to Mr. Remy of Flower, Remy & Gregory—he told me it was not necessary to appear unless the witness fees were tendered me.

Q. (p. 504) Were you employed by the firm of Boies, Fay & Conkey during the year 1882? A. I was.

Q. In what capacity? A. As salesman and buyer. I bought canned goods, fancy groceries, cigars, tobacco, etc.

Q. Did you buy them from agents and also give orders to different manufacturers for goods for the firm? A. Yes, sir.

Q. (Graves' Rec., 509.) Did you, as a buyer of this firm, at any time prior to January 22, 1883, when your store was closed by the sheriff, advise or tell any creditors of the firm from whom you bought goods, that Julius K. Graves had retired as a special partner in the firm? A. I did not.

Q. In making the purchases as you did, as buyer for this firm, were you ever directed by either Boies, Fay or Conkey to inform the persons from whom you were buying goods, that Julius K. Graves had retired from the firm as a special partner? A. No, sir.

Q. (Graves' Rec., 513.) Were you ever directed by either Boies, Fay, Conkey or Graves, in ordering goods * * * to erase or obliterate from the letter-heads "J. K. Graves, Special"? * * * A. No, sir; I never was.

Q. And never did, did you? A. No, sir.

The letter-head referred to and shown the witness is as follows:

BENJAMIN B. FAY.
J. K. GRAVES, Special.

WILLIAM A. BOIES. LUCIUS W. CONKEY.

BOIES, FAY & CONKEY,

WHOLESALE GROCERS

AND

IMPORTERS.

113–115 South Water St.
2–4 Dearborn St.

Chicago,.....'82.

Q. (Graves Rec., 509.) Did you, as an employe of the firm, during the months of November, December and January up to the time of the failure.

have charge of the warehouse receipts issued for and in behalf of the firm? A. Yes, sir—they were in the safe, in the office.

Q. Where were those warehouse receipts, if you know, on the day of the failure of the firm, the 22d of January, 1883? A. Some of them were in the safe.

Q. About how many? A. May have been three or four, or five.

Q. About what amount in value would they represent? A. That has passed out of my recollection.

Q. What warehouses, naming them, did the firm of Boies, Fay & Conkey have goods in, during the months of November, December and January? A. Knight and Howe, Central Warehouse and David Wiley's.

Q. (510.) What employe of the firm delivered these goods to these several warehouses? A. They were delivered there by our teamsters.

Q. Who were your teamsters? A. The teams were owned by Mr. Olin,

Q. And were they sent there by the teams controlled by Olin? A. Yes, sir.

During the examination of Mr. Lynch, he was shown and identified over fifty original invoices of goods, bought after December 2, 1882 (Graves' Rec., 514 to 535), in the name of Boies, Fay & Conkey, and several of the bills bought by Mr. Fay—checked off by Fay—and his initials, B. B. F. written thereon, and some of them bought by, and checked off by Mr. Lynch; the dates of the purchases so identified by Mr. Lynch are as follows: Seven bills purchased on December 2, 1882; four on December 4th, four on December 5th, two on December 7th, three on December 8th, two on December 9th, two on December 11th, one on December 12th, two on December 13th, two on December 14th, one on December 15th, one on December 16th, two on December 18th, four on December 19th, four on December 20th, ten on December 21st, one on December 22d, one on December 26th, one on December 27th, one on December 28th, one on December 29, 1882, and three on January 1, 1883.

The firm's Bank Account overdrawn on December 2, 4 and 6, 1882.

It appears by the testimony of Mr. Vaughan that on December 4, 1882, (being two days after one of the pretended dissolution notices appeared in the Chicago Evening Journal announcing that Mr. Boies had withdrawn from the firm), he made a small deposit in the First National Bank in the name of Fay & Conkey, and that from that date until the failure the appellant, the First National Bank, paid the firm checks, whether signed by Boies, Fay & Conkey, or Fay & Conkey, but Mr. Vaughin says (Graves' Rec., 437) that the transfer of the Boies, Fay & Conkey account to Fay & Conkey was not made until after all the outstanding Boies, Fay & Conkey checks were in.

On December 2, 1882, (Graves' Rec., 727) the firm's account with the bank was overdrawn $679.31. On December 4th, it was overdrawn $4,972.23. On December 6th it was overdrawn $6,152.23. And on each of these days, for the purpose of securing the bank on these overdrafts, the firm was required by Mr. Gage to again put up warehouse receipts for goods of more value than the amount of these several overdrafts.

With reference to these overdrafts, Mr. Gage testified as follows (Graves' Rec., 745):

Q. (By Mr. Flower.) You have stated, Mr. Gage, that on December 6, 1882, you held warehouse receipts in addition to those you held as security for the loan. What amount did you hold of warehouse receipts? A. I cannot tell.

Q. (Graves' Rec., 746.) Were they sufficient in amount, as you recollect, to have covered the overdraft of between $6,000 and $7,000 at that time? A. We then believed it to be so, and supposed such was the case.

Mr. Vaughan was examined in regard to the firm's account

with the First National Bank on December 2, 1882, as follows:

Q. (Graves' Rec., 430.) Can you tell by the stubs of the check-book on the First National Bank, where the checks signed by Boies, Fay & Conkey, end? A. No, sir.

Q. What is the last check deducted from the bank account of Boies, Fay & Conkey with the First National Bank under date of December 2, 1882? A. The last check was (No.) 23,720 payable to the Hide and Leather Bank for $2,500 in payment of a note.

Q. In whose favor was the note? A. Note was in favor of J. K. Graves for $2,500.

Q. According to the stub of the check-book, how did the account stand with the First National Bank after deducting this check? A. An overdraft of $2,164.53.

Q. Were there some checks previously given by the firm that had not yet been deducted from the bank account? A. I think there were.

Mr. Vaughan further says (Graves' Rec., 430 to 432), that the following checks signed Boies, Fay & Conkey were outstanding at that time (December 2, 1882), and payable to creditors as follows:

No. 23,559, dated November 18, 1882, for	$	309 14
No. 23,669, dated November 27, 1882, for		1,992 03
No. 23,707, dated December 1, 1882, for		169 95
No. 23,561, dated November 18, 1882, for		112 40
No. 23,582, dated November 20, 1882, for		647 17
No. 23,689, dated for		1,451 12
No. 23,701, dated November 29, 1882, for		249 55
No. 23,705, dated December 1, 1882, for		275 00
No. 23,667, dated November 27, 1882, for		235 20
No. 23,706, dated December 1, 1882, for		164 26
No. 23,690, dated November 29, 1882, for		2,758 12
These outstanding checks amount to	$	8,364 04

Q. (Graves' Rec., 431.) Had these checks been taken into account on December 2d, how would the account have stood then, with the First National Bank of Chicago? A. I could not tell without figuring them up; it would be that much more overdrawn.

In addition to this, Mr. Vaughan says that Julius K. Graves

then (December 2, 1882), held other Boies, Fay & Conkey checks as follows (Graves' Rec., 431-2):

No. 23,629, dated December 4, 1882, for $1,000
No. 23,630, dated December 6, 1882, for 2,000
No. 23,631, dated December 11, 1882, for 2,000

Q. When were these checks drawn? A. They were drawn about November 24th.

Q. And given to Mr. Graves, and dated ahead? A. Yes, sir.

Q. Did not Mr. Graves also hold check No. 23,665 for $3,000? A. Yes, sir.

Q. When was that check given? A. November 27th, ——

Q. And also No. 23,666 for $3,000? A. Yes, sir, dated December 16—Graves held that.

On page 729 of Graves' record all these checks are shown in full.

These additional checks, held at that time by J. K. Graves (December 2, 1882), amount to $11,000, and this amount added to the $8,364.04, makes $19,364.04 of outstanding checks of Boies, Fay & Conkey on the First National Bank of Chicago, on December 2, 1882, and their bank account then overdrawn $2,164.53.

It appears by the record that these checks for $11,000, so held by J. K. Graves, were paid to him by the First National Bank of Chicago prior to the failure of the firm, and it further appears that the following described checks were also given (Graves' Rec., 729-732) by the firm to J. K. Graves on or after December 2, 1882, and paid to him by the First National Bank prior to January 22, 1883.

Check No.	23,927,	dated December 30, 1882, for	$2,000
" "	23,989,	dated December 26, 1882, for	3,000
" "	23,944,	dated December 20, 1882, for	1,200
" "	23,928,	dated January 4, 1883, for	1,500
" "	24,100,	dated January 4, 1883, for	1,900
" "	23,929,	dated January 6, 1883, for	1,500
" "	24,128,	dated January 8, 1883, for	2,500

Check No. 24,129, dated January	9, 1883, for	2,500	
" " 23,930, dated January	13, 1883, for	2,000	
" " 23,931, dated January	16, 1883, for	2,000	
" " 24,125, dated January	18, 1883, for	1,500	
" " 24,292, dated January	18, 1883, for	35	27

All of these original checks being shown to Mr. Gage (Graves' Rec., 728–730), he was asked if they were paid through the First National Bank of Chicago, and what account they were charged to, when he answered (Graves' Rec., 728): They were all paid by the First National Bank of Chicago, and all charged, I have no doubt, to the account of Fay & Conkey.

Q. (Graves' Rec., 728.) If Boies, Fay & Conkey checks were so charged to the account of Fay & Conkey, by whose direction was it done? A. I cannot now remember by whose direction; by some direction, however, that was competent.

Check No. 23,561 on First National Bank, dated November 18, 1882, signed by Boies, Fay & Conkey, and payable to Pennsylvania Salt Manufacturing Company, was shown Mr. Gage (Graves' Rec., 734), when he was asked:

Q. I wish you would look, Mr. Gage, and tell me when that check was received by the First National Bank for collection, and when it was paid? A. It was received, paid and remitted for on the 12th day of December, 1882.

Q. To what account was it charged? A. Fay & Conkey.

Q. By whose direction? A. By the direction we had previously received from either Fay or Conkey, or their cashier, Mr. Vaughan; I am unable to say which.

Having now shown the firm's outstanding checks on the First National Bank on December 2, 1882, to be $19,364.04, and their overdrafts on the books of the First National Bank to be

On December 2, 1882,.....	$ 679 31
On December 4, 1882,.....	4,972 23
On December 6, 1882,.....	6,152 23

and that these overdrafts were secured by Mr. Gage taking warehouse receipts for merchandise, bought by Mr. Fay on the credit of the limited partnership, we will call attention to Mr. Gage's testimony on this point.

C. Q. (Graves' Rec., 741, by Mr. Flower.) Your attention was also called to certain overdrafts between the 2d and 6th of December, inclusive. Will you state whether you held any collateral securities for these overdrafts on the 6th of December, 1882? A. Yes, sir; it was against goods we held.

Q. (By Mr. Manning.) Which goods, Mr. Gage? A. The canned goods, warehouse receipts, in excess of those held for the $20,000 loan.

Q. (Graves' Rec., 738.) Can you tell me, Mr. Gage, the number of warehouse receipts the bank held on the 2d of December, 1882, and the warehouses in which the goods were stored? A. No, sir.

Q. What amount did the bank realize on the warehouse receipts it held on December 2, 1882, and what amount of warehouse receipts were, from and after December 2, 1882, surrendered to Fay & Conkey? A. It is impossible to state.

Q. (p. 739.) You are familiar with the books of the bank, are you not, Mr. Gage, with reference to the Boies, Fay & Conkey account? A. Generally so, yes sir.

Q. Will the books of account of the First National Bank of Chicago show the amount, and the exact amount realized by it on the warehouse receipts it held of Boies, Fay & Conkey on the 2d of December, 1882?. A. There are no records on the book showing specifically the amount realized.

Mr. Fay was also examined about the warehouse receipts held by the First National Bank, and he testified as follows:

Q. (Graves' Rec., 314.) How much in amount in warehouse receipts of Boies, Fay & Conkey did the First National Bank hold on January 22, 1883, or about what amount? A. I could not give you the exact amount.

Q. Can you tell about the amount? A. No, sir; I cannot tell what the amount was.

Q. Was it $40,000? A. No, sir, I should say not.

Q. Was it $30,000? A. It may have been.

A pertinent inquiry at this point is: Why cannot Mr. Fay tell the amount of warehouse receipts held by the bank, and *why* cannot Mr. Gage tell the amount in value of the warehouse receipts which the bank held as collateral security for the large overdrafts of December 4 and 6, 1882?

Why is he unable to state to whom such receipts were delivered? Is it not more than probable that Julius K. Graves got them, and if he did, is it not likely that Mr. Gage gave them to him, when he was here on December 4, 1882, for this

is the date when Mr. Graves demanded, and received, a note from the firm for $766.66, for the balance, which he then claimed to be due him under his fraudulent agreement for $10,000 per annum with his firm, and this too, is the date when he got Fay and Conkey to execute their four notes for $2,500 each to him, without any consideration whatever, and solely for his accommodation—these four accommodation notes, and the $766.66 note are shown. (Graves' Rec., 365-6.)

One of these accommodation notes payable in two months, one of them in three months, one in four months, and the other in five months after date.

The time of payment of this first accommodation note clearly shows that Graves and Fay had previously arranged that whenever Boies forced a publication of the secret dissolution notice, they would begin their grand larceny of the firm assets. They knew that the Illinois statutes required six weeks' publication of a dissolution notice to dissolve a limited partnership.

In a letter written by Fay to Graves, dated December 2, 1882, he says (Graves' Rec., 1,062):

"We could not publish the dissolution yesterday as there was a paper for W. A. B. (William A. Boies) to sign, and we did not find him until this A. M. The publication will go into Sunday's Tribune, and *your notice* will appear in Legal News, Monday, and the latter must be published six weeks."

Mr. Graves was asked (Graves' Rec., 1,060) how he understood Fay's reference in this letter to the publication notice, and he replied:

I understood from that, that the general notice would be given in the Tribune, *to the public*, as an item of information, and perhaps in accordance with law, but that the strict legal publication must be six weeks, and that would be in the Legal News.

C. Q. Did you (J. K. Graves) ever see the publication of the dissolution which is made an exhibit in Boies' deposition, marked Exhibit "A" and

identified by Conkey as the one he saw published in the Chicago Evening Journal? A. I have read it.

"C. Q. Do you recognize it as the advertisement (showing it to witness)? A. Yes, sir; I think that is the one.

If there was no other testimony, this letter from Fay to Graves tells enough to convict the members of the firm of making a fraudulent agreement for the dissolution of the limited partnership.

In the first place, this letter shows that until the paper referred to was signed by William A. Boies, on the morning of December 2, 1882, no dissolution had before then been perfected between the parties, because the publication could not be made until another paper was signed by Boies.

Second. This letter shows that prior to the date of it, (December 2, 1882,) Graves and Fay had discussed their fraudulent plan for publishing their previously prepared varieties of dissolution notices, for Fay says to Graves, "The "*publication* will go into Sunday's Tribune (that is, the one "announcing only the withdrawal of Boies) and *your* notice "(the one pretending to dissolve the limited partnership) "will appear in Legal News, Monday, *and the latter must be* "*published six weeks.*"

The *publication*—the one the firm's creditors would be likely to see—will be published in the Chicago Tribune, and the other one, which the creditors never will see, will appear Monday, in a weekly sheet called "Legal News", and this must appear each Monday for six weeks.

We are unable to find any letter in which one of these fraudulent schemers says to the other, what they will do, or intend to do, while that six weeks' publication notice is running; but what they *did* do from December 2d to January 22d, is well portrayed by the testimony, and it clearly shows a bold attempt on their part, to steal the entire assets of this limited

partnership, and not allow the *bona fide* creditors of the firm to receive one cent on a dollar of their several demands against the firm.

Starting with December 4, 1882, the day "*your* (Graves) "notice first appeared in Legal News," we find Julius K. Graves with all or nearly all of the following described checks of the limited partnership on the First National Bank of Chicago in his pocket—all dated ahead—and also $2,500 in cash, which was paid to him by the firm (Graves' Rec., 430) on December 2d.

Check No. 23,629 for $1,000, dated December 4, 1882 (Graves' Rec., 728).
" " 23,630 for 2,000, dated December 6, 1882 (Graves' Rec., 729).
" " 23,631 for 2,000, dated December 11, 1882 (Graves' Rec., 729).
" " 23,665 for 3,000, dated December 12, 1882 (Graves' Rec., 729).
" " 23,666 for 3,000, dated December 16, 1882 (Graves' Rec., 729).
" " 23,944 for 1,200, dated December 20, 1882 (Graves' Rec., 730).
" " 23,989 for 3,000, dated December 26, 1882 (Graves' Rec., 730).
" " 23,927 for 2,000, dated December 30, 1882 (Graves' Rec., 729).
" " 23,928 for 1,500, dated January 4, 1883 (Graves' Rec., 730).
" " 24,100 for 1,900, dated January 4, 1883 (Graves' Rec., 731).
" " 23,929 for 1,500, dated January 6, 1883 (Graves' Rec., 731).
" " 24,128 for 2,500, dated January 8, 1883 (Graves' Rec., 731).
" " 24,129 for 2,500, dated January 9, 1883 (Graves' Rec., 731).
" " 23,930 for 2,000, dated January 13, 1883 (Graves' Rec., 731).
" " 23,931 for 2,000, dated January 16, 1883 (Graves' Rec., 732).
" " 24,125 for 1,500, dated January 18, 1883 (Graves' Rec., 733).
" " 24,126 for 1,500, dated January 20, 1883 (Graves' Rec., 373).
" " 24,184 for 1,500, dated January 25, 1883 (Graves' Rec., 376).
" " 24,185 for 1,500, dated January 26, 1883 (Graves' Rec., 375).
" " 24,186 for 1,000, dated January 27, 1883 (Graves' Rec., 378).

Regarding the four $2,500 notes, the court below found as follows (Bank Rec., 64):

"The judgment confessed in favor of the Commercial National Bank of Dubuque, represented, in part, four notes of $2,500 each, drawn by Fay & Conkey, in favor of Graves, for his accommodation. These notes did not represent an indebtedness of the firm, and yet Graves caused them to be treated as part of the firm's indebtedness, and that amount was paid out of the

assets of the limited partnership. This was not done through inadvertence or mistake, for Graves knew the facts, and in the argument his counsel admitted this."

The testimony on which this finding of the court is based, is furnished by the appellant Julius K. Graves (Graves' Rec., 368), where he testified as follows:

Q. What were these four $2,500 notes given to you for Mr. Graves? A. These four $2,500 notes were given to me for my accommodation, by Fay & Conkey, the makers.

Q. At your request? A. Yes, sir.

Q. There was no consideration for the paper except to accommodate you, was there, Mr. Graves? A. That is all.

Having now shown that on October 20, 1882, Julius K. Graves received from the firm their note for $5,000, payable in ninety days, which note was nowhere entered on the firm books, and executed unbeknown to Mr. Vaughan—that on October 21, 1882, Julius K. Graves received from Mr. Fay a deed conveying to Rufus E. Graves the five acres of land on Humboldt Boulevard owned by the firm, and valued at $20,000, let us now call the attention of the court to what was done on September 23, 1882, when the firm's note before referred to, for $25,000, payable to J. K. Graves, fell due.

How J. K. Graves got the $25,000 due him paid.

It appears by the record, and by the testimony of Mr. Vaughan (Graves' Rec., 424–5), that this note for $25,000 fell due while Mr. Fay was in the east buying goods, and that Vaughan, at the request of Julius K. Graves, renewed that indebtedness by giving to Graves four notes, all dated September 23, 1882, signed Boies, Fay & Conkey, per T. F. Vaughan, as follows:

One note at thirty days for $5,000, payable to J. K. Graves.

Two notes at two months for $5,000 each, payable to J. K. Graves.

One note at three months for $10,000, payable to J. K. Graves.

It further appears that on October 26, 1882, when the thirty day note so given on September 23d fell due, it was again renewed for ninety days, and this time the firm name on the note was signed by Mr. Fay, and the note made payable "to the order of ourselves." Mr. Vaughan's testimony on this point being as follows (Graves' Rec., 425):

Q. Please look on October 26th and see if there is not a note given, or renewed to Julius K. Graves for $5,000, at ninety days, on page 50 of bills payable book? A. October 26th; yes, sir.

Q. When does that note mature? A. Matures January 27th, 1883.

Q. I will ask you if this is not one of the notes purporting to have been paid by you on January 20, 1883. A. It is marked paid January 20.

This note so paid is one of the $5,000 notes taken up by Julius K. Graves from L. J. Gage, at the First National Bank of Chicago, with the checks of Beveridge and Dewey, and J. W. Doane & Co., on January 20, 1883—*seven days before it was due.*

On November 26, 1882, one of the two notes at two months, so given to J. K. Graves on September 23d by Mr. Vaughan was paid, and the other was renewed on November 27th, for sixty days. This also being signed by Mr. Fay, and also made payable "to the order of ourselves."

In regard to this note Mr. Vaughan testified (Graves Rec., 426), as follows:

Q. Is this last note you have spoken about, dated November 27, 1882, and payable in sixty days, the other of the $5,000 notes to J. K. Graves which purports to have been paid on January 20, 1883? A. Yes, sir.

This note, by its terms, would mature on January 29, 1883, and it is the other $5,000 note which was taken up by Julius K. Graves from L. J. Gage, at the First National Bank of Chicago, on January 20, 1883, *nine days before it was due*, with

the checks of Beveridge & Dewey, and J. W. Doane & Co., so fraudulently obtained on that day by B. B. Fay and Julius K. Graves.

Will appellant's counsel pretend that these manipulations of J. K. Graves with L. J. Gage of the First National Bank, were straightforward business transactions, carried through without some previous understanding between them, that the bank would assist Graves, as against the firm's creditors, to protect himself, on his liability as endorser on the firm's paper?

The court below (Bank Rec., 67) found that:

"Graves needed the aid of the bank to accomplish his purpose, and it co-operated with him through Gage. The bank was apparently willing, if not desirous; that Graves should (be) protected against threatened loss, provided it did not suffer thereby."

We respectfully submit that the appellant, the First National Bank, did, through Mr. Gage, co-operate with Julius K. Graves and aid him in accomplishing his purposes, and that the finding of the court below should be approved. Let us see what further the record shows about this $10,000 payment to the First National Bank on January 20, 1883.

Mr. GRAVES testified as follows (Graves' Rec., 1027):

Q. (By Mr. FLOWER). Did you see the check which was given by Beveridge and Dewey? A. I recollect they gave Mr. Fay a check for $7,000.

Q. What was done with that check, if you know? A. It was used at the First National Bank to cover payments.

Q. Were you present at the time of its payment at the bank—this check of $7,000? A. Yes, sir; I was.

Q. Was any other check of any other party given to the bank at that time? A. Yes, sir.

Q. What was it? A A check of J. W. Doane & Co., I think, for $3,000.

Q. To whom were the two checks handed—what officer of the bank? A. My recollection is to Mr. L. J. Gage.

C. Q. (Graves' Rec., 1,044.) I now show you two notes that are exhibits to Vaughan's deposition, one dated October 26, 1882, for $5,000, payable in

ninety days, and the other dated November 27, 1882, in sixty days, and ask you if those are the two notes that you took up on Saturday, January 20, 1883?

A. I cannot say whether they were or not.

C. Q. What would be your best judgment about it? A. They bear no stamp, and I cannot give any judgment. They purport to be Boies, Fay and Conkey (notes) and with my genuine endorsement *canceled.*

C. Q. Were these notes, or the notes paid on that day, delivered to you or Mr. Fay, by Mr. Gage? A. They may have been handed to me, and I canceled the endorsement, or they may have been given to Mr. Fay.

C. Q. Do you know why it was they were not marked paid? A. No, sir; I do not.

C. Q. Do you know why it was (if these are the notes) they were paid before they were due? A. I do not recall it now.

C. Q. Why did you go over with Mr. Fay to pay these notes? A. I may have met him there; I do not know; I am frequently in the First National Bank.

Mr. GAGE testified regarding the payment of these two $5,000 notes before due as follows (Graves' Rec., 746):

On January 20, a piece (note) of $5,000 endorsed by J. K. Graves was paid.

Q. When was that to mature? A. The 29th of January, and another one of $5,000 paid on the same date, endorsed by Graves, which matured January 27th.

Q. By whom were those paid? A. I think they were paid by Mr. Graves.

Q. In currency, or by check, if you know? A. I think by check.

Q. Whose check? A. I cannot remember.

Q. What did he say with reference to his paying it before due, if anything? A. Nothing that I remember at all.

Q. Was the paper surrendered to Mr. Graves? A. It was.

Q. Did you see either Mr. Fay, or Mr. Conkey on that day, that you remember? A. I do not remember that I did.

Cross-Examination by Mr. Manning.

C. Q. (Graves' Rec., 1,081.) I notice, Mr. Gage, that the note first introduced by Mr. Flower as exhibit P—$5,000 note signed by Fay and Conkey, and payable to the order of the First National Bank, matured January 22, 1883—the day the store was closed by executions issued on judgments by confession? A. I so understand it.

C. Q. On Saturday, preceding (20th), by your testimony it appears that

two $5,000 notes were paid to the bank—one to mature on January 27th and the other to mature on January 29th. Will you tell me why it was that paper was paid, seven and nine days before due, and this one left unpaid? A. I do not know.

The two notes so paid before due are shown (Graves' Rec., 447) and read as follows:

$5,000. CHICAGO, Oct. 26th, 1882.

Ninety days after date we promise to pay to the order of ourselves Five Thousand Dollars at our office, value received. Due January 27.

BOIES, FAY & CONKEY.

Endorsed (erased in original) J. K. Graves—Boies, Fay & Conkey.

$5,000. CHICAGO, Nov. 27th, 1882.

Sixty days after date we promise to pay to the order of ourselves Five Thousand Dollars at our office, value received. Due January 26–29.

BOIES, FAY & CONKEY.

Endorsed (erased in original) J. K. Graves—Boies, Fay & Conkey.

The note so left unpaid is shown (Graves' Rec., 1,080) and reads as follows:

$5,000. CHICAGO, Dec. 30th, 1882.

Twenty days after date we promise to pay to the order of the First National Bank of Chicago Five Thousand Dollars at our office, value received.

No. 3,030, due January 19—22, 1883.

FAY & CONKEY.

Stamped paid.
March 10, 1883.
First National Bank, Chicago.
Endorsed (erased in original) J. K. Graves.

We respectfully submit that this transaction shows conclusively that J. K. Graves and L. J. Gage had previously conferred together and agreed upon some plan or arrangement, whereby the First National Bank of Chicago would assist Graves in a scheme to fraudulently retire the paper of the limited partnership, and whenever an opportunity offered, to substitute Fay & Conkey paper therefor. Without the co-operation of Mr. Gage, Mr. Graves could not have arranged with the First National Bank to use the Beveridge & Dewey and J. W. Doane & Co. checks, to take up limited partnership

paper not due, and leave unpaid Fay & Conkey's notes then due.

Mr. Vaughan testified in regard to the payment on January 20, 1883, of these two notes, as follows (Graves' Rec., 397):

Q. Please show to me the paper—bills payable—paid by the firm on the 20th of January, 1883—the $10,000 entry I now refer to? A. There is $5,000.

Q. Please give the date of the note? A. The date of the note is October 26th—matures 27th of January.

Q. That you paid on the 20th? A. That is paid on the 20th.

Q. What other piece of paper was paid on that day? A. One note here, November 27th, sixty days, matures 29th of January, for $5,000.

Q. (Graves' Rec., 398.) Do you know why you paid this one seven days before it was due, and the other nine days before it was due? A. I do not.

Q. (Graves' Rec., 410.) Do you recollect how long it was after Mr. Fay told you about the store going to be closed (by the sheriff) that you made that entry, to "bills payable" $10,000? A. I do not; some time during the afternoon.

Q. An hour or two? A. It might have been an hour; might have been two hours. I generally close my cash at night.

Q. That entry, then, may not have been made until at night? A. What I mean by night is before 6 o'clock.

Q. Until the time you close? A. Just before I close. I made my entries to balance my cash, my closing entries.

Q. Where is the cash balance of that day—you made at 6 o'clock that evening? A. It was made on a piece of paper and the paper destroyed.

Q. Who destroyed it? A. I did.

Q. At whose request? A. Nobody's.

Having now shown that the two notes of $5,000 which were paid to Mr. Gage on January 20, 1883, by J. K. Graves, were renewals of a part of the indebtedness owing by the firm to Mr. Graves, prior to taking their August, 1882, inventory, we will go back to the firm's transactions during December, 1882.

On December 4th and 6th, we have shown how Mr. Gage demanded, or pretended to demand, and received additional warehouse receipts for the firm's overdrafts on those days. We will here make a little further investigation of the record

to see if we can ascertain what particular occasion there was for these overdrafts on December 4th and 6th. On December 4th, check No. 23,629 (Graves' Rec., 728) for $1,000, payable to J. K. Graves, is presented to Mr. Gage at the First National Bank and paid.

On December 6th, check No. 23,630 (Graves' Rec., 729) for $2,000, payable to J. K. Graves, is presented to Mr. Gage and paid by the First National Bank. In order to get these two checks paid J. K. Graves had to arrange with L. J. Gage that the limited partnership would pledge its goods as security for the overdraft which must be made if the firm checks so held by J. K. Graves were honored, and this on December 4th, the very day when the pretended notice of dissolution of the limited partnership was first published in the "Legal News."

Certainly Mr. Graves exercised remarkable diligence in his attempt to "feather his nest" during the first three days, while his assorted styles of dissolution agreements were being published—for on December 2d he received, as heretofore shown, cash $2,500; on December 4th he gets cash $1,000, and $10,000 of firm notes for his own accommodation, and $766.66 which he claims is his due under his fraudulent $10,000 per year agreement.

On December 6th he (Graves) so manipulates with Mr. Gage that he gets cash $2,000, making a total for three days' efforts of $16,266.66.

Mr. Gage when asked (Graves' Rec., 745) what amount in value of warehouse receipts for goods he required to be put up to secure the First National Bank on these overdrafts of December 4th and 6th, says: "*I cannot tell*"; and when further asked, "to whom the warehouse receipts were delivered and when," says, "I cannot tell"; but thinks they were (Graves' Rec., 746) sufficient in value to cover the overdrafts.

On December 8, 1882, Mr. Gage required, or pretended to require, the firm to deliver canned goods (not warehouse receipts as before) as collateral security to the First National Bank for a demand loan on that day of $8,000. (This note is shown in Graves' Rec., 1076.)

In the October 14, 1882, note for $10,000 (Graves' Rec., 1074), the collateral security is described as "merchandise in store."

In the October 18, 1882, $10,000 note (Graves' Rec., 1075) the collateral security is described as "goods in store as per W. H. receipts," while in the December 8, 1882, note the security is described as "canned goods, the market value of "which is now $, with full power and authority (to the "bank) to sell and deliver the whole of said property at pub- "lic or private sale, at the option of said bank, and with the "right to be purchasers themselves, at any time without ad- "vertisement or notice."

This shows an actual delivery direct to the First National Bank of the canned goods as they arrived. Why this change on December 8, 1882, in the manner of dealing; why should the bank require an actual delivery of the goods and purposely leave the value of such goods *blank*, unless there was some secret arrangement between Mr. Graves and Mr. Gage as to what disposition should be made of this merchandise?

The inquiry was made in the court below, and is repeated here—what became of the greater portion of this firm's merchandise?

On January 1, 1882, the firm had on hand goods of the value of $212,313.70 (Graves' Rec., 393), while on January 22, 1883, only $54,806.52 (Graves' Rec., 811) was realized by the sheriff from a sale of such goods as were turned over to him by Fay and Conkey.

What became of the excess? Did the First National Bank of Chicago, or Julius K. Graves, or Fay and Conkey convert or secrete a large part of the goods and merchandise bought by Mr. Fay on the credit of the limited partnership?

Mr. Vaughan when called as a witness for the defendants, was asked by Mr. Flower (Graves' Rec., 886):

"Q. What was the amount of goods received and put in stock after December 2, 1882? A. I think about $200,000.

Q. (Graves' Rec., 887.) What was the aggregate amount substantially of the indebtedness of Boies, Fay and Conkey on December 2, 1882? A. It was about $400,000.

Cross-Examination by Mr. Manning.

C. Q. (Graves' Rec., 893.) Mr. Vaughan, you have testified in your direct examination that a large proportion of the indebtedness of Boies, Fay & Conkey was retired, and Fay & Conkey indebtedness given in lieu thereof; can you give the amount of paper so retired with the names of parties with whom the exchange was made? A. No, sir.

C. Q. In changing this liability from Boies, Fay & Conkey to Fay & Conkey, did you ever advise or inform any of the parties that in the October preceding Graves had withdrawn from the firm? A. No, sir.

C. Q. Did you ever advise any of the parties of the financial condition of the firm as shown by this August, 1882, inventory? A. No, sir.

C. Q. (Graves' Rec., 894.) Why was it that you did not give Boies, Fay & Conkey's acceptances for goods purchased in the name of Boies, Fay & Conkey? A. I did not sign them. I made them out and they were signed by Mr. Fay.

On December 11, 1882, the First National Bank paid to Julius K. Graves, Boies, Fay & Conkey's check No. 23,631 for $2,000 (Graves' Rec., 729), and on the same day Fay & Conkey gave J. K. Graves another note for $5,000, which reads as follows (Graves' Rec., 1,080):

"$5,000. CHICAGO, Dec. 11, 1882.

Sixty days after date we promise to pay to the order of J. K. Graves, five thousand dollars, at our office, value received.

FAY & CONKEY."

As Mr. Gage in his testimony claims that at the time of the failure, the First National Bank held this note, it is probable Mr. Graves got it discounted by Mr. Gage.

On December 12, 1882, the First National Bank paid to J. K. Graves, Boies, Fay & Conkey's check No. 23,665, for $3,000 (Graves' Rec., 729), and on this day Fay & Conkey executed another note payable to J. K. Graves, which reads as follows (Graves' Rec., 997):

"$5,000. CHICAGO, Dec. 12, 1882.

Ninety days after date we promise to pay to the order of J. K. Graves, five thousand dollars, at the Importers and Traders National Bank, for value received. FAY & CONKEY."

On December 14, 1882, the $5,000 firm note dated September 11, 1882, at ninety days, given to J. K. Graves, and signed Boies, Fay & Conkey, per Vaughan, was protested for non-payment, and Mr. Gage says:

(Graves' Rec., 733.) The First National Bank of Chicago had this protested note for collection on December 15, 1882.

On December 16, 1882, the First National Bank of Chicago paid to J. K. Graves, Boies, Fay & Conkey's check No. 23,666, for $3,000. (Graves' Rec., 729.)

On December 18, 1882, Fay & Conkey executed another note for $5,000, payable to J. K. Graves, which reads as follows (Graves' Rec., 996):

"$5,000. CHICAGO, Dec. 18, 1882.

Ninety days after date we promise to pay to the order of J. K. Graves, five thousand dollars, at the Importers and Traders National Bank of New York, value received. FAY & CONKEY."

On December 20, 1882, the First National Bank paid to J. K. Graves the firm check No. 23,944, for $1,200. (Graves' Rec., 730.)

On December 26, 1882, the First National Bank paid to J. K. Graves the firm check No. 23,989 for $3,000 (Graves' Rec., 730), and on this day the three months note (shown on page 425) for $10,000, signed Boies, Fay & Conkey, per T. F. Vaughan, and made payable to J. K. Graves, on September

23d, fell due; and this $10,000 is again renewed by two $5,000 notes, which read as follows (Graves' Rec., 1,079):

$5,000. CHICAGO, December 26, 1882.

Sixty-five days after date we promise to pay to the order of J. K. Graves five thousand dollars, at our office, value received.

FAY & CONKEY.

$5,000. (p. 1080.) CHICAGO, December 26, 1882.

Ninety days after date we promise to pay to the order of J. K. Graves five thousand dollars, at our office, value received.

FAY & CONKEY.

These two last described notes Mr. Gage says (Graves' Rec., 1,079) were held by the First National Bank of Chicago, on January 22, 1883, and in his statement Exhibit "A" (Graves' Rec., 1070), he (Gage) classes them as "*notes of Fay and Conkey endorsed by J. K. Graves.*"

We suggest that it would be better to class them as Boies, Fay & Conkey notes, held by the special partner J. K. Graves, and fraudulently renewed by Fay and Conkey, for the purpose of placing them in the First National Bank of Chicago, to be held in trust for Julius K. Graves, or else as a basis for a confession of judgment, by Fay and Conkey, in favor of the First National Bank of Chicago, for the benefit and protection of Julius K. Graves, by virtue of a previous arrangement with Mr. Gage.

On December 30, 1882, the First National Bank paid to J. K. Graves the firm check number 23,927 (shown Graves' Rec., 729), for two thousand dollars, and on this day the bank took a five thousand dollar note (shown Graves' Rec., 1080), payable in twenty days, signed by Fay and Conkey, and endorsed by J. K. Graves.

On January 4, 1883, the First National Bank paid to J. K. Graves two of the firm checks (shown Graves' Rec., 730 and 731), No. 23,928, for $1,500, and No. 24,100 for $1,900.

On January 6, 1883, the First National Bank paid to J. K.

Graves the firm check No. 23,929 (shown Graves' Rec., 731) for $1,500.

On January 8, 1883, the First National Bank paid to J. K. Graves the firm check No. 24,128 (shown Graves' Rec., 731) for $2,500.

On January 9, 1883, the First National Bank paid to J. K. Graves the firm check No. 24,129 (shown Graves' Rec., 731), for $2,500.

On Saturday, January 13, 1883 (being the day when Graves' six weeks publication in the Legal News of his pretended dissolution notice expired) the First National Bank paid to J. K. Graves the firm check No. 23,930 (shown Graves' Rec., 731), for $2,000.

Graves had been in Chicago several days, lying in wait for this six weeks to expire, but it appears that after due consideration they decided to run the firm along another week, and see how much more could be saved to Graves from the wreck.

As to being in Chicago, J. K. Graves testified as follows (Graves' Rec., 361):

Q. And you were in this city (Chicago), were you, on the 22d of January, 1883, when the (Boies) Fay & Conkey store was closed by the sheriff? A. I was.

Q. And you were here on the Saturday preceding? A. I was; I was here (p. 362) all the week preceding the 22d of January, 1883.

On Monday, January 15, 1883, in furtherance of their fraudulent scheme, Graves gets Fay & Conkey to make a ten days' sight draft on him at Dubuque, Iowa, when he is in Chicago, which he (Graves) accepts in Chicago, and then Vaughan credits the amount of this acceptance to Graves' account (Graves' Rec., 163), evidently for the purpose of making it appear by the firm books that Graves put back into the firm

some of the money he had before then drawn out. This draft is shown (Graves' Rec., 1080), and reads as follows:

$7,000. CHICAGO, January 15th, 1883.

Ten days sight, pay to the order of ourselves seven thousand dollars, value received, and charge the same to a/c of

FAY & CONKEY.

To J. K. Graves, Esq., Dubuque, Iowa.

(Written across the face): "Accepted January 15th, 1883.

J. K. GRAVES."

This $7,000 draft, after being so credited to J. K. Graves' account, also appears on Exhibit "A" to L. J. Gage deposition (Graves' Rec., 1071), and he (Gage) claims that it was held by the First National Bank of Chicago on January 22, 1883. If we accept this theory of the defendant's case, and deduct this $7,000 from J. K. Graves' account, shown (Graves' Rec., 163), then Julius K. Graves actually drew out in cash all the special capital he put in the firm, except $12,067.78, and if we deduct from this the $6,666.66 that he received under his $10,000 per annum agreement, then Graves' loss, on the defendant's showing, is only $6,000.62.

On January 16th the firm check No. 23,931, for two thousand dollars, payable to J. K. Graves, was presented to the First National Bank of Chicago, and its payment refused, whereupon Orville Peckham (the attorney of the bank), notary public, on January 18, 1883, protested it (Graves' Rec., 732), and sent notice of such protest to Julius K. Graves, to Commercial National Bank of Dubuque, to First National Bank of Chicago, and to Fay & Conkey.

In reference to the protest of this check, Mr. Gage testified as follows (Graves' Rec., 736):

Q. I notice that one of the checks, you say was paid by the bank, dated January 16, 1883, to the order of J. K. Graves, signed by Fay & Conkey, is marked, "Protested for non-payment." I will ask you if that was protested by the First National Bank? A. It was—it was protested and returned to Dubuque, then sent back, and paid with protest fees.

On January 17, 1883, Fay & Conkey and Graves, being desirous of getting more money in the First National Bank of Chicago, succeeded in getting the Importers and Traders National Bank of New York to discount a five thousand dollar note, which reads as follows (Graves' Rec., 997):

$5,000. CHICAGO, January 17th, 1883.

Ninety days after date we promise to pay to the order of Importers & Traders National Bank, New York, five thousand dollars at the Importers & Traders National Bank of New York, value received.

FAY & CONKEY.

Endorsed on back: J. K. GRAVES.

During the examination of Mr. Vaughan (Graves' Rec., 413, 414) with reference to the firm's bank account with the Importers and Traders National Bank of New York, it appeared that the following described checks were drawn by the firm on this New York bank:

One check, dated	Jan. 13, 1883,	for	$5,200 00,	to F. A Bigelow.
" " "	Jan. 17, 1883,	for	2,747 00,	to F. A. Bigelow.
" " "	Dec. 30, 1882,	for	1,137 09,	to D. Lynch.
" " "	Jan. 10, 1883,	for	1,068 24,	to D. Lynch.
" " "	Jan. 16, 1883,	for	2,210 00,	to D. Lynch.
" " "	Jan. 18, 1883,	for	1,131 00,	to F. A. Bigelow.
" " "	Jan. 19, 1883,	for	981 91,	to F. A. Bigelow.

Mr. Vaughan testified as follows (page 413):

"Q. Was F. A. Bigelow employed in this house? A. Yes, sir.

Q. In what capacity? A. Bill clerk.

Q. What salary did he get? A. He got fifty dollars a month.

Q. How did his account stand on January 1, 1883? A. The house owed him $85.53.

Q. (Graves' Rec., 414.) Did they have an employe named D. Lynch? A. Yes, sir.

Q. How did his account stand on January 1, 1883? A. The house owed him $62.75.

Then Mr. Vaughan was asked what these checks were given for, to Bigelow and Lynch. (Graves' Rec., 413.) A. They were given to draw the money from the Importers and Traders Bank, to be deposited in the First National Bank.

Q. (Graves' Rec., 414.) That is, you drew checks on the Importers and

Traders National Bank, payable to the order of Bigelow, and deposited them in the First National Bank, did you? A. Yes, sir.

Q. Why were they given in Bigelow's name? A. I suppose to keep the banks from knowing they were drawing out of there, for deposit in this bank.

Q. To keep which bank from knowing? A. The Importers and Traders.

Q. Mr. Bigelow never received any money on these checks? A. Never received any compensation at all.

Q. (Graves' Rec., 415.) Did Mr. Lynch ever receive any money on any of these checks? A. Not a cent.

Q. I notice under date December 16, 1882, a check to J. H. Kistner, $1,604.20, and one on December 20th to Kistner, $1,110.25. What was that given for? A. Same purpose as the other.

Q. Did he (Kistner) receive any money on that? A. No,sir.

Q. In what capacity did he serve the firm? A. City book-keeper."

The testimony of Mr. Gage (Graves' Rec., 1,076-7) shows that the January 18th check to Bigelow for $1,131, and the other for $981.91, January 19th, were returned protested from New York, so that to that extent, a part of the scheme to withdraw money from New York and deposit it in First National Bank of Chicago, failed.

On January 18, 1883—the day the firm check No. 23,931 to Graves was protested, he (Graves) succeeded in getting the First National Bank, through Mr. Gage, to pay to him two other checks of the firm which he then held, one being No. 24,125 for $1,500 (shown, Graves' Rec., 733), and the other No. 24,292 for $35.27.

On January 19th and 20th, Graves succeeded in getting the bank, through Mr. Gage, to pay the protested check No 23,931 for $2,000.

SATURDAY, JANUARY 20, 1883—THE DAY THAT GRAVES AND FAY GOT $7,000 OF BEVERIDGE & DEWEY, $3,000 OF J. W. DOANE & CO. AND GIVE IT TO L. J. GAGE FOR TWO OF THE J. K. GRAVES $5,000 NOTES AND THE DAY WHEN FAY AND CONKEY SIGNED A JUDGMENT NOTE FOR $40,000 AND $2,000 ATTORNEY'S FEES IN FAVOR OF THE FIRST NATIONAL BANK OF CHICAGO.

We now come to Saturday, January 20, 1883, the day when Graves, Gage and Fay & Conkey decide to have the firm fail, or pretend to fail.

These four men have kept the insolvent limited partnership boat of Boies, Fay & Conkey afloat one whole week, after the expiration of Mr. Graves' six weeks' publication of his secret dissolution notice in "The Legal News," and on this Saturday, Mr. Gage got Mr. Fay to turn over to the First National Bank all the customers' notes held by the firm—not John Smith or Ed. Olin notes—but *bona fide* notes, given by customers of the firm for merchandise.

On this point Mr. Gage testified in behalf of the defendants as follows (Graves' Rec., 1,086):

Cross-Examination by Mr. Manning.

"Q. How much paper known as customers' paper, of the amount upon Exhibit "A" was received by the First National Bank on January 20, 1883? A. $3,445.79.

Q. How much was paid (to the bank) on these demand notes on January 22, 1883? A. $1,266."

We have shown how J. K. Graves and Fay on this day obtained a $7,000 check from Beveridge & Dewey, and one for $3,000 from J. W. Doane & Co., and with them took up two of the J. K. Graves five thousand dollar renewal notes, before due from L. J. Gage at the First National Bank, and we will now call attention to other transactions and

interviews between Fay, Conkey, Graves and Gage on this day.

We have shown that Flower, Remy & Gregory were Boies, Fay & Conkey's regular attorneys, that Mr. Remy drew the several pretended dissolution notices, bills of sale, etc.—that Mr. Remy knew of the secret agreement existing between the members of the limited partnership to withhold the publication of the dissolution notices, and we think we have already shown that Mr. Remy knew of the insolvency of the limited partnership on or before October 19, 1882, when he drew these pretended dissolution papers and bills of sale.

During all the year 1882, Flower, Remy & Gregory were the regular attorneys for the First National Bank of Chicago. On this point, Mr. Gage testified as follows:

Q. (Graves' Rec., 752.) Are Flower, Remy & Gregory the regular attorneys of the bank, or do you employ other firms? A. We have in constant employment as notary, and counsel in the ordinary transactions of the bank, Mr. Orville Peckham, to whom we pay a stated salary. Aside from this, we have no attorneys, except the firm of Flower, Remy & Gregory.

Q. (Graves' Rec., 745.) Do I understand, you Mr. Gage, that on Saturday, January 20, 1883, Mr. Remy called on you with reference to the Boies, Fay & Conkey matter? A. Yes, sir, he did.

Q. In whose interest did he come to you, as you understood it? A. It was his duty to come here, as I understand it—his firm had a retaining fee from the bank, and were under the obligations that counsel for the bank would be.

Q. When was a retaining fee given them, that you refer to in your answer, and what was the amount of it? A. The amount of it was $500; I can not remember when it was paid, now.

Q. (Graves' Rec., 751) Mr. Gage, have you been able to find the date of the retainer referred to by you as given Flower, Remy & Gregory? A. (page 752.) On February 6, 1882, we paid a retainer of $500, and on February 20, 1883, another $500.

Q. What services have they rendered outside of the Boies, Fay & Conkey case to which this $500 payment might apply, if any? A. I do not know.

C. Q. (Graves' Rec., 755, by Mr. Flower.) Now, paying to Tenney, Flower & Cratty, and Flower, Remy & Gregory, a general retainer of $500 per year

—will you state whether that applied to any particular business, or was it intended to cover any services to the bank? A. It was to apply in general, and no specific matter.

Mr. Gage when called as a witness for the defendants, testified as follows:

C. Q. (Graves' Rec., 1,082.) Do you recollect having a conversation with Mr. Graves during the week preceding January 22, 1883, in which you told him in substance that you had become satisfied that the firm was financially embarrassed, and that he had better not put too much reliance on what Mr. Fay told him, and he had better investigate for himself? A. I remember that distinctly.

C. Q. About how long was that before the Saturday on which he paid those notes—Saturday, January 20, 1883? A. If I recollect right, it was Tuesday or Wednesday.

C. Q. That is, during the week preceding January 20, 1883? A. Yes sir

C. Q. You had no doubt, at that time, of the financial responsibility of J. K. Graves, had you? A. Well, no, sir; I had no reason to have any doubt of it * *

C. Q. (Graves' Rec., 1091.) You doubted the (firm's) solvency, as you say, from the Tuesday preceding, or Wednesday? A. I doubted it for some time previous to that.

C. Q. How long previous to that had you doubted it, or about how long? A. Two or three weeks; I cannot remember.

C. Q. Did you ever doubt the responsibility of the firm with Julius K. Graves as the special partner? A. Yes.

C. Q. As nearly as you can remember, about how long prior to the 2d of December, 1882, did you have doubts in your mind about the financial responsibility of Boies, Fay & Conkey? A. I don't think I had doubts specially applied to them as distinct from other firms engaged in the same business, employing only a moderate capital, until within, as I said, ten, twelve or fifteen days prior to the denouement—prior to the failure.

C. Q. Why term it a failure, when, on the Saturday preceding they had taken up $10,000 of their paper, seven and nine days before due? A. When the sheriff comes into a man's house and locks it up, I think it is generally construed as a failure.

C. Q. (Graves' Rec., 1,092.) The First National Bank of Chicago first sent the sheriff into their store, did it not? A. That is correct.

C. Q. (Graves' Rec., 1,084.) You testified in your direct examination that you did talk with Mr. Remy about priority of the bank's judgment. What was said between you and Mr. Remy with reference to that priority? A. We had two or three conversations. I remember his saying that he would enter judgment in favor of the bank, so that the bank would have a prior lien.

C. Q. Over all other creditors? A. Yes, sir.

C. Q. (Graves' Rec., 1,085.) It was understood between you and Graves, was it not, at that that time, that Graves should come in second to the First National Bank as a creditor? A. At what time?

C. Q. On the 20th or 22d of January, 1883? A. My recollection is, Mr. Graves expected that his execution would be handed to the sheriff with ours. I understood from Mr. Remy, afterwards, that he determined then, with or without Mr. Graves' consent, to put ours in first and Graves' second.

C. Q. (Graves' Rec., 1,088.) Were you, as an officer of the First National Bank, on the 20th or 22d of January, 1883, advised by your attorneys, or did you then know that it was unlawful for any member of a limited partnership to sign or deliver judgment notes to any creditor for the purpose of giving such creditor a preference over the other creditors of such partnership? A. I was not so advised at that time, and did not then know it.

C. Q. (Graves' Rec., 754.) Mr. Gage, when this judgment note of $40,000 was given, will you please state whether or not that was regarded as a general collateral, simply for any balance that might be due to the bank after exhausting the previous securities? A. It was in that view that the matter was considered.

Q. (Graves' Rec., 750.) How much money did the bank receive from the $42,000 judgment which you say Mr. Remy entered for you? A. $38,708.35.

Q. What became of the balance of it, if you know? A. I do not know.

Q. From whom did you receive $38,708.35? A. I think it was paid by Flower, Remy & Gregory.

Q. Did you ever make any inquiry as to what became of the balance of that judgment? A. No, sir.

Q. By Mr. Manning (Graves' Rec., 764). On the 26th of February, 1883, as I understand, you as an officer of and in behalf of the bank then claiming $38,708.35 against either Boies, Fay & Conkey or Fay & Conkey, consented that any monies in excess of this amount might be applied by Flower, Remy & Gregory on a judgment in favor of J. K. Graves in the Superior court against Fay & Conkey of $18,375, rendered January 22, 1883, did you? A. Yes.

Q. (Graves Rec., 760.) Did you at that time think that the amount paid you, the $38,708.35, would be sufficient to protect the bank on the liabilities of Fay & Conkey? A. We then believed it would.

In the decree rendered in the court below the court found as follows (Bank Rec., 69):

"The court further finds that upon the judgment for the forty thousand dollars ($40,000) confessed on the twenty-second day of January, 1883, by Fay & Conkey as successors of the limited partnership, the defendant The First

National Bank of Chicago, on or about February 26, 1883, received out of the sale of the assets of the Limited (from) the sheriff, on an execution in favor of said bank, thirty-eight thousand seven hundred and eight dollars and thirty-five cents ($38,708.35). * * * It is therefore ordered, adjudged and decreed that the defendant The First National Bank of Chicago, pay to Robert E. Jenkins, receiver herein, the sum of fifty thousand seven hundred and twenty-one dollars and ninety-five cents, being the sum so illegally received by said bank, with interest thereon, at six per cent. from February 26, 1883.

The foregoing will, we think, dispose of the 14th error assigned by appellant, which is as follows:

14th. The Circuit court erred in entering a decree against the said First National Bank, directing the payment by it within thirty days to R. E. Jenkins, receiver of the sum of $50,721 95.

Flower, Remy & Gregory acting as attorneys for plaintiffs and defendants.

In regard to Flower, Remy & Gregory acting, on January 20, 1883, as the attorneys for Boies, Fay & Conkey, for Julius K. Graves, and for the First National Bank of Chicago, Mr. Remy testified in substance as follows (Graves' Rec., 817):

Between 2 and 3 o'clock on January 20, 1883, Mr. Fay came to me and stated that Mr. Graves wanted to see me, and the employment of our firm was made by Mr. Graves with me in Mr. Fay's presence on that day.

Q. (Graves' Rec., 829, by Mr. Flower): Mr. Remy, there is testimony in the case here with reference to a couple of drafts of $1,250 each, drawn by Fay & Conkey on J. K. Graves to our order, and accepted by him? A. I know all about them. When Mr. Graves and Mr. Fay and Mr. Conkey came to our office to employ us, I stated to Mr. Graves we were in the habit, in cases of that character, of having a retainer fee, and he wanted to know how much we wanted. I wanted to know how much there was involved, what was the extent of the liabilities, etc. After getting as much information as I could from Mr. Fay and Mr. Graves together, I desired to know what they expected of us. Mr. Graves stated to me he desired those creditors holding paper upon which he was endorser to be protected; to which Mr. Fay assented. I asked Mr. Graves if he expected us to represent him through this entire matter—see that his interests were protected. He said he did. I asked Mr. Fay what he desired us to do in the matter for him and Conkey. I told him if we entered judgments in these matters, of course, we could not take

any retainer against them in any suits; we would have to see to the protection of these liens. He said, yes, that is all he expected us to do. I told him we would expect, of course, to charge the creditors the attorney's fees provided for in the notes, providing the judgments were collected; that would materially reduce probably the amount of our charges to them, and we ought to have five thousand dollars retainer fees in a failure of that size. After some little talk Mr. Graves said they had no money to pay, and that I must moderate that a little bit—to, perhaps, $2,500 as retainer fees for us—taking the fees provided for in the judgment notes. I finally told him that would be satisfactory, and asked him if he could give us a check for the amount. He said no he could not, but he would see it was paid, and upon that I accepted the retainer and the work, and at Mr. Graves' suggestion, I think, drew these two $1,250 drafts, and he gave us his check for one of them, and the other, I think, I discounted it and got money on it. Anyhow, we got the money on these drafts, $2,500.

C. Q. (Graves' Rec., 835.) How soon after that interview with Fay and Graves did you have an interview with L. J. Gage of the bank? A. I think I had an interview with Mr. L. J. Gage during the time that these gentlemen were in the office. I went down and saw Mr. Gage, and asked what he desired us to do. Fay and Graves remained in my office during my absence, and stayed until 5 or 6 o'clock.

C. Q. (Graves' Rec., 836.) Did you see any other of the creditors on that Saturday, except Mr. Gage? A. Not on Saturday.

C. Q. How long an interview did you have with Graves, Fay and Conkey in your office on Sunday, January 21, 1883? A. Well, I think it commenced about 11 o'clock, and I think Mr. Graves went to his hotel along in the evening and Mr. Boies went home some time in the evening. Mr. Conkey and myself remained here some time after. We went home some time that night.

C. Q. (Graves' Rec., 837.) Was it decided on Saturday, or on Sunday, that the First National Bank and Graves should have priority over all other creditors? A. Yes, sir; it was decided on Saturday, and further decided on Sunday, that these men (B. B. Fay and L. W. Conkey) should confess judgment to the parties holding the paper upon which Graves was endorser, and they would likewise protect the First National Bank.

C. Q. At whose direction on Monday morning did you deliver the executions at the sheriff's office in the order—first, the First National Bank; second, Julius K. Graves; and, third, John H. Lull? A. I delivered the executions on the judgment of the First National Bank first to the sheriff, by direction of Mr. Gage. I had no instructions with reference to the other executions.

J. K. Graves specially employs Mr. Remy to defend the liens of the confessed judgments in his favor.

Mr. Remy is shown the original judgment notes for $17,500 and $27,000, signed by Fay & Conkey, in favor of Julius K. Graves, and the narr. and cognovit (Graves' Rec., 838–9), when he says:

They are all in my handwriting—I drew them on Sunday, and W. S. Geary, a clerk in Flower, Remy & Gregory's office., signed the cognovits as defendants' attorney.

C. Q. (Graves' Rec., 840.) Did you (Mr. Remy) understand at the time how much of that $2,500 was paid to you as a retainer for Mr. Graves, and how much by Fay & Conkey? A. I did not. I had no understanding on the subject.

C. Q. What was you to do for Mr. Graves under that retainer? A. We were to take no suits against him. We were to see that these liens were protected, and to generally look after his interests in any litigation arising.

C. Q. What were you to do for Fay & Conkey under that retainer? A. We were not to take any cases against them other than the judgments which they desired to confess to the various creditors, and we were to see that the lien of the judgment which they desired to confess for the benefit of the endorser, Mr. Graves, on the paper held by various parties were protected, and defend these liens during any litigation that might arise.

This testimony shows that Fay, Conkey and Graves feared they would have difficulty in maintaining their unlawful preferences, otherwise they would not have contracted in advance with Mr. Remy to "*defend the liens during any litigation that might arise.*"

Flower, Remy & Gregory to have $2,500 retainer and five per cent. on all the confessed judgments.

Mr. Remy further testified as follows (Graves' Rec., 840–1):

C. Q. With whom did you make the arrangement whereby you were to have, in addition to that retainer, five per cent. attorney's fees on the judgments you should thereafter enter by confession? A. The arrangement was made with Mr. Fay, and with Mr. Conkey; I think in Mr. Graves' presence—

we were to have the five per cent. attorney's fees on all judgments collected in addition to the retainer, by the agreement of these parties.

C. Q. (Grave's Rec., 841.) By whose direction did you include in the First National Bank judgment $2,000 attorney's fees? A. Well, not by direction of any one specially. Mr. Fay and Mr. Conkey understood it, and assented to it. Mr. Gage was aware of it, and I had informed him that the note would provide for $2,000 attorney's fees.

Mr. Remy further says (Graves' Rec., 842-3) that Flower, Remy & Gregory actually received as attorney's fees under judgments confessed by B. B. Fay and L. W. Conkey, the following amounts: Under the judgment confessed in favor of the First National Bank of Chicago, $2,000; under the judgment confessed in Superior court in favor of Julius K. Graves, $875; under the judgment confessed in U. S. Circuit court in favor of Julius K. Graves, $1,350; under the judgment confessed in favor of Commercial National Bank of Dubuque, $712.50; under the judgment confessed in favor of Dubuque County Bank, $595; under the judgment confessed in favor of the Importers & Traders National Bank of New York, $800; and under the judgments confessed in favor of the Bay State Sugar Refinery Company, First National Bank of Westburough of Massachusetts, Addison G. Robinson, Hiram A. Sheldon, Alvin F. Shumway, and Walter Potter, designated by Mr. Remy as complainants in second creditor's bill (Graves' Rec., 827) $2,227.30.

The several sums so received aggregate $8,559.80, and this we think will dispose of the *seventh error* assigned by appellants, which is as follows (Bank Rec., 165):

7. That the court erred in its finding that the law firm of Flower, Remy & Gregory received as attorney's fees out of the assets of said insolvent limited partnership the sum of $8,559.80, or any other sum.

Julius K. Graves was examined by Mr. Flower and testified as follows (Graves' Rec., 1,065):

Q. When did you first employ Flower, Remy & Gregory as your attorneys in any capacity, or consult with them? A. January 20, 1883.

Mr. Fay testified in regard to the services of Flower, Remy & Gregory:

Q. By Mr. MANNING to Mr. Fay (Graves' Rec., 297): What services were to be rendered for the $2,500? A. Services in connection with our misfortunes.

Q. What services?

By Mr. Flower: Such services as they might require, of course.

A. (By Mr. Fay): Services we might want of them.

Q. What was talked over that they were to do for that $2,500?

(Counsel (Mr. Flower) objected to witness stating, and instructs witness not to answer the question.)

Q. Do you, according to the instructions of Mr. Flower, decline to answer that question? A. Yes.

Q. Was it talked over between you that in addition to the $2,500, they should have five per cent. on all the judgments by confession? A. I think the remark was made by Mr. Remy.

Q. Did you know, at the time you signed the judgment note in favor of the First National Bank of Chicago, that five per cent. made an additional $2,000 attorney's fees? A. Yes, I did.

Q. And you knew that as to all of them, did you? A. Yes, sir.

Q. (Graves' Rec., 347.) To whom did you deliver the note in favor of the First National Bank? A. Delivered it to Mr. Remy, I think.

Q. Why did you leave it with Mr. Remy? A. Mr. Graves had seen Mr. Gage required it, and I understood he was so instructed.

Q. Who told you so? A. Mr. Graves and Mr. Remy.

JOHN W. DYER, the credit man employed by Boies, Fay & Conkey for three years prior to their suspension, says (Bank Rec., 133–4):

I was a daily visitor in the office of Flower, Remy & Gregory.

Q. You were pretty friendly with the firm (of Flower, Remy & Gregory) at that time (December, 1882), were you not? A. Well, in a business way; yes, sir. There was a contract existing between the firm of Boies, Fay & Conkey and Flower, Remy & Gregory, that they were to have all the business.

L. J. GAGE ADVISES J. K. GRAVES TO EMPLOY FLOWER, REMY & GREGORY.

JULIUS K. GRAVES says (Graves' Rec., 1048) in substance:

The arrangement was made in Flower, Remy & Gregory's office that the execution on the judgment confessed by Fay & Conkey, in favor of the

First National Bank, should be the first lien, and the one in my favor, the second lien upon the firm's stock of goods. I had *seen* Mr. Gage, and we talked it over, and Fay & Conkey consented. While we (Fay, Conkey and myself) were together, and before going to Flower, Remy & Gregory's office, on Saturday afternoon, January 20, 1883 (Graves' Rec., 363), I demanded the judgments and threatened to put a sheriff in the store. While in Flower, Remy & Gregory's office I figured up, as near as I could, the total amount of paper outstanding bearing my endorsements; I wanted judgments to cover that. My desire then was to take the judgment in my name, to represent the amount of my endorsement. Subsequently, and on Monday morning January 22, I asked for a judgment in my name, for I think, $27,000 and I asked for a judgment in my name for $18,000, and I asked for a judgment in favor of the Importers and Traders National Bank of New York for $16,000; I asked for a judgment in favor of the Commercial National Bank of Dubuque, and also for the Dubuque County Bank of Dubuque, and for one in favor of John H. Lull.

Q. (Graves' Rec., 368.) Were Flower, Remy & Gregory your attorneys at that time? A. I think I retained them that day. I made inquiry about them of Mr. L. J. Gage, Vice-president of the First National Bank of Chicago.

Q. How long were Fay and Conkey with you in Flower, Remy & Gregory's office on Saturday January 20, 1883? A. I should say a couple of hours.

The Sunday Consultation in Flower, Remy & Gregory's Office.

Q. By Mr. Manning to J. K. Graves. (Graves' Rec., 369.) Did you meet Fay and Conkey again in Flower Remy & Gregory's office on Sunday, January 21, 1883? A. Yes, sir.

Q. What was the subject discussed on this Sunday between you? A. I had asked on Saturday that a judgment representing all my endorsements be made to me. I discussed the matter on Sunday, and asked that they all be made, or suggested they all be made direct to the parties who held the paper; or at least that half of it be so entered, so that the judgments would run in favor of the actual holders of the paper—the actual owners of the paper. I was merely an endorser on it and as such was liable. I think Mr. Flower was present. As the result of my conversation with him, they were then (Monday) arranged as they now stand on the records.

Q. (By Mr. Flower, Graves' Rec., 1,043.) What was said between yourself, Fay and Conkey and Mr. Remy, if he was present, with reference to a retainer of $2,500? A. We were there in Mr. Remy's office—been discuss-

ing the matter. Mr. Remy spoke up to Fay—Fay and Conkey—whoever was there—and said they must be paid a fee, and asked them how they could do it; asked them if they had any money—they had none—did not know how they could get it; and I remember Mr. Remy remarked that they could not work on wind. I finally agreed to accept two drafts to be drawn by Fay & Conkey, at sixty and ninety days for $1,250 each, and they were to be included in the judgments I was to take. (*This explains the John H. Lull judgment.*) I agreed with Mr. Remy that one of these acceptances should be cashed at once, so far as he was concerned, or his firm, and that the other would be met in due course. The drafts were drawn—I accepted them. They were to pay their fee from Fay & Conkey, and I then expected it would cover any expenses I might be at. I did not anticipate this litigation, and of course this cuts no figure in it. I am responsible to my attorneys for their fee in these cases.

Mr. Fay's attention was called (Graves' Rec., 295) to these two $1,250 acceptances, and was asked:

Q. What do they represent? A. Attorneys' fees.

Q. What were they given for? A. Services.

Q. Rendered or to be rendered? A. Both.

Q. Had there been services rendered at that time for which these notes (acceptances) were given? A. Well, most of them were to be rendered—most of the services.

Q. (Graves' Rec., 296.) To whom did you give those notes (acceptances)? A. Mr. Remy, on January 20th or 22d.

Q. Had you conferred with any other member of the firm of Flower, Remy & Gregory than Mr. Remy at that time? A. I had some conversation with Mr. Flower at that time.

Q. Did you pay them, or agree to pay them, any money in excess of these notes (acceptances) for their services? A. What was to be collected on judgment notes.

Mr. Fay further testified as follows (Graves' Rec., 281):

Q. Did you meet Mr. Remy or Mr. Flower anywhere on Sunday, the 21st of January, 1883? A. I think I saw them at their office.

Q. How long did you remain there that day? A. Several hours. The matter under discussion on that day was, the method of closing up (our business)—the firm was hard up, and we had to stop.

C. Q. (Graves' Rec., 969.) You have just testified that the principal cause of your suspension on January 20, 1883, was because Graves would not endorse for you. What paper, and to what creditors did you ask him to endorse any paper on the 20th of January, 1883? A. Asked him to endorse some paper to discount.

C. Q. Do you recall any creditor who was particularly pressing you on that day, or had threatened you with any suit, outside of Julius K. Graves? A. No one had threatened us with any suit that I recollect of.

C. Q. Is it true Mr. Fay, as Mr. Graves has testified, that on that 20th of January, 1883, he told you that if you did not meet him at Flower, Remy & Gregory's office within an hour, that he would have the sheriff in your store on that day, or words to that effect? A. I do not recollect that circumstance

C. Q. Do you recollect any circumstance in substance like that between you and Mr. Graves? I do not.

How the Firms Money was divided between B. B. Fay, L. W. Conkey and J. K. Graves.

Having now shown the several interviews between Mr. Gage, Mr. Graves, Mr. Remy, Mr. Flower, Mr. Fay and Mr. Conkey, on Saturday, January 20th, and Sunday, January 21st, we will, at this point, call attention to some of the testimony relating to the disposition during that time of the firm's cash.

Mr. Vaughan says (Graves' Rec., 396):

On January 20, 1883, Fay and Conkey each drew out from the firm's funds $566 in currency.

Q. By Mr. Manning to Mr. Vaughan (Graves' Rec., 396). Did you pay it to them? A. I did; in currency, Saturday evening.

Q. Where did you get the currency? A. Out of the safe and drawer.

Q. (Graves' Rec., 393.) Did you make the payment entered on page 273 of this City Cash Book "B" to J. K. Graves' special account, $1,005.25, as erased here? A. Yes, sir.

A copy of the entries on pages 272 and 273 of Boies, Fay & Conkey's City Cash Book "B" is shown (Graves' Rec., 161) is as follows:

Cash received:			Cash paid out:		
1883.			1883.		
Jan. 20.	Bills receivable	$3,445 79	Jan. 20,	Freight, 135 bbls. flour	$ 44 25
	J. W. Doane & Co.	3,000 00		B. B. Fay	566 00
	Loan account B. and D	7,000 00		L. W. Conkey	566 00
				Bills payable	10,000 00
			22,	J. K. Graves' special ac'ct. (This entry having been changed by erasure from $2,215 38.)	1,005 25
				B. B. Fay	605 06
				L. W. Conkey	605 07
				L. W. Conkey	325 00
				Mr. Fay's expenses to Dubuque	50 00
				B. B. Fay	448 48
				L. W. Conkey	448 48
				J. K. Graves' checks. B. B. F	526 00
				Balance to Bradford Hancock	1,927 96

Q. (Graves' Rec., 442.) Was the amount as originally entered, $2,215.38, the amount given to Graves on Sunday, January 21, 1883? A. Yes, sir.

Q. (Graves' Rec., 398.) How was that paid—currency or checks? A. Gave him currency and checks both.

Q. Did you give it to him? A. No, sir; I think I gave it to Mr. Fay. I think in Flower, Remy & Gregory's office on Sunday, the 21st of January.

Q. Was it in checks or currency? A. Both.

Q. Did Mr. Fay give it to Mr. Graves in your presence? A. Yes, sir.

Q. You saw it delivered? A. Yes, sir.

Q. (Graves' Rec.. 399.) Did you carry this currency to Flower, Remy & Gregory's office to be delivered to Graves on Sunday, the 21st of January? A. I do not remember whether I carried it there, or whether Mr. Fay did.

Q. How long were you at Flower, Remy & Gregory's office on Sunday, the 21st of January, 1883? A. I was there probably an hour, or an hour and a half.

Q. Who was present in the office during the time you were there? A. Mr. Fay, Mr. Conkey, Mr. Remy, Mr. Graves, Mr. Gascoigne, and a young man in the office and myself.

Q. Who asked you to go there on Sunday? A. Mr. Fay and Mr. Conkey both.

Q. When did they so ask you? A. Saturday evening.

Q. After the payment of this $566.00 to them? A. Yes, sir.

Q. (Graves' Rec., 408.) Did you hear anything said on that Sunday, either at the store or at Flower, Remy & Gregory's office, about the store of Fay & Conkey being closed the next day? A. I did; yes, sir.

Q. What did you hear? A. I heard that it would be.

Q. (Page 409.) How was it to be closed? A. On judgment notes.

Q. Who told you? A. Mr. Fay.

Q. Did you hear anything about it on Saturday when you were dividing that money with them? A. Yes, sir.

Q. What did you hear Saturday? A. Heard the same thing.

Monday, January 22, 1883.

Mr. Vaughan further says (Graves' Rec., 400):

On (Monday) January 22, 1883, between eight and ten o'clock, after receiving the first mail, I paid to Mr. Fay $605.06, and to Mr. Conkey $605.07 and $325.

Q. What time in the day were the payments on January 22, 1883—to B. B. Fay, $448 48, and the same amount to Mr. Conkey? A. That was the last mail—

Q. Is the entry to J. K. Graves on the 22d, $526, in your handwriting? A. Yes, sir.

Q. (Graves' Rec., 401.) Was that a payment of currency, or checks? A. It seems to be in checks—remittances received by the firm, I think.

In reference to this payment of $526 to J. K. Graves, Mr. Fay testified as follows:

Q. (Graves' Rec., 298.) I call your attention to the city cash book "B," on page 273, under date January 22, to an entry—J. K. Graves, checks by B. B. F., $526. Are these checks you gave to Mr. Graves? A. Yes, sir. I paid him checks that were received from our customers.

Q. When and where did you deliver those checks to Mr. Graves? A. Delivered them to him right at the bank door in First National Bank building.

Q. When was it you delivered them to him? A. I know it was the afternoon of January 20th.

These two payments, $2,215.38 and $526, so made to the appellant, Julius K. Graves, amount to $2,741.38, and the finding of the court below as to this sum is as follows (Graves' Rec., 156):

The court further finds, that on the 21st and 22d days of January, 1883, the said Julius K. Graves fraudulently appropriated to his own use drafts and checks belonging to the said limited partnership amounting to $2,741.38."

The court below also found:

That the several sums so obtained by B. B. Fay and L. W. Conkey on January 20th, 21st and 22d were fraudulently appropriated by them to their own use.

Having now shown how Fay, Conkey and Graves seized upon and divided up the money received by the firm on January 20th, 21st and 22d; and how Mr. Graves and Mr. Gage, acting for the First National Bank, succeeded in getting $3,445.79, of notes from the firm, and the sheriff in possession of the store and entire stock of merchandise belonging to the limited partnership under executions issued on their unlawfully confessed judgments, let us now see how Mr. Remy is engaged on January 22, after going to the firm store with deputy sheriff Burke, and directing the levy of said executions.

Assignment of Accounts to Felix, Marston & Blair.

It appears that on January 22, 1883, Flower, Remy & Gregory had in their hands for collection Boies, Fay & Conkey claims to the amount of $10,194.12. (Bank Rec., 153.) Mr. Conkey, it seems, had told Frank M. Blair, about four or six months before January 22d, that if any disaster came to his firm, he would protect Felix, Marston & Blair. (Bank Rec., 155.) On January 22, 1883, Boies, Fay & Conkey owed Felix, Marston & Blair $1,720.94, and Mr. Remy conceived the idea of pretending to assign all the claims in the hands of Flower, Remy & Gregory to Felix, Marston & Blair, as security for their debt, and he wrote the following assignment and got Conkey to sign it (Bank Rec., 23):

> For value received, we hereby sell, assign and make over all our right, title and interest in and to the annexed claims in favor of Boies, Fay & Conkey, and for Fay & Conkey, their successors, to Felix, Marston & Blair, of Chicago, as collateral security for the payment of any and all moneys due them from us for merchandise purchased of them. It is understood that said claims are now in the hands of the firm of Flower, Remy & Gregory for collection, and are subject to a lien by them for any and all advances for costs and expenses and their commissions for collecting said claim.
>
> Dated at Chicago, this 22d day of January, A. D. 1883.
>
> Fay & Conkey.

At the time this paper was signed, no list of claims was attached to it, but Mr. Remy says (Bank Rec., 155), it was to include all the claims in his firm's hands for collection from Boies, Fay & Conkey.

After Bradford Hancock was removed as receiver and Robert E. Jenkins appointed in his stead, this pretended protection to Felix, Marston & Blair was discovered, when it was found that Flower, Remy & Gregory had collected on these assigned claims (Bank Rec., 153), $1,843.59, and paid over $750 to Felix, Marston & Blair in full settlement of their claim, and

pocketed the balance, and that they still had some $8,000 of these claims not yet collected.

Mr. Marston was called on March 10, 1886 (over three years after the date of the pretended assignment of accounts), as a witness by the complainant, Corbin, when he testified as follows (Bank Rec., 154):

I am a member of the firm of Felix, Marston & Blair. On January 22, 1883, Boies, Fay & Conkey were indebted to us $1,720.94, open account.

Q. Did you, on the 22d day of January, or have you at any time since, up to the present time, ever known of any of the old accounts of Boies, Fay & Conkey having been assigned to your firm? A. No, sir.

Q. How does the Boies, Fay & Conkey account now appear upon the books of Felix, Marston & Blair? A. It is closed.

Q. Please tell the court and master how it is closed? A. On March 26, 1883, we received $?00 from Flower, Remy & Gregory; on May 25, 1883, we received $350 entered on our books as having been deposited by Flower, Remy & Gregory. On December 29, 1883, we received in the same way $100, making a total of $750.

Q. What disposition, if any, has your firm made of the balance of that account? A. The 31st of December, 1883, fifty per cent. of the balance charged to profit and loss—31st of December, 1884, the rest was charged to profit and loss and the books closed.

Frank M. Blair was examined by Mr. Flower and testified as follows (Bank Rec., 157):

Q. Who were the attorneys of Felix, Marston & Blair in 1882 and 1883? A. Flower, Remy & Gregory.

Mr. Remy testified as follows (Bank Rec., 155):

Q. I drew this document (assignment of Boies, Fay & Conkey accounts) at the request of Mr. Conkey.

Q. Why did he say he wanted to assign those accounts to Mr. Blair? A Because he said he had agreed with Mr. Blair to protect him if any disaster came to his firm.

Q. When did he first tell you that he had agreed with Mr. Blair in case of disaster? A. He told me about four or six months prior to that time, he had agreed with Mr. Blair that he would see him protected upon any goods he sold the firm in case of a disaster.

This testimony from Mr. Remy, the regular attorney for the First National Bank, shows that he knew at least four months before January 22, 1883—that is, on September 22, 1882—that Mr. Conkey was anticipating the failure of Boies, Fay & Conkey, and consulting with Remy as to the creditors of the firm he desired to prefer, when the failure occurred—this was after taking the August, 1882, inventory, and while Mr. Fay was in New York buying goods on credit. This was before the secret dissolution papers were drawn by Mr. Remy.

The knowledge of Remy as an attorney for the First National Bank is sufficient notice to the bank, and such knowledge binds the bank.

Rogers v. *Palmer*, 102 U. S., 263.
Brown, Assignee v. *The Jefferson Co. Nat. Bank*, 9 Fed. Rep., 258.

January 23, 1883.

Let us further examine the evidence and see what is done with the drafts and checks that came in by mail addressed to Boies, Fay & Conkey on January 23, 1883. In Bradford Hancock's report as receiver (Bank Rec., 134) he says "cash in hands of attorneys Flower, Remy & Gregory $1,927.96." In regard to this item Mr. Hancock testified as follows:

Q. When and how, if you know, was that $1,927.96 put in the hands of Flower, Remy & Gregory? A. As I understand that, it is collections they retained.

Q. (Bank Rec., 135.) Do you understand that that $1,927.96 was money collected, or money received by Flower, Remy & Gregory from the time the store was closed on the 22d of January to the morning of the 23d, when you were appointed receiver? A. Yes, sir.

Q. You never have had that money in your hands at all, have you? A. No, sir.

First Creditor's Bill Filed.

Next, we call attention to the disposition by Flower, Remy & Gregory of the $27,000 judgment note signed by B. B. Fay and L. W. Conkey, in favor of J. K. Graves, and the proceedings based thereon. This note is shown (Graves' Rec., 164), and reads as follows:

Chicago, Ill., January 22, 1883.

On demand for value received, we promise to pay to the order of Julius K. Graves twenty-seven thousand dollars at the First National Bank of Chicago, with interest at eight per cent. per annum after date until paid.

And to secure the payment of said amount I hereby authorize irrevocably any attorney of any court of record to appear for me in such court, in term time or vacation, at any time hereafter, and confess a judgment, without process, in favor of the holder of this note for such amount as may appear to be unpaid thereon, together with costs and five per centum attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my said attorney may do by virtue hereof.

$27,000. Benjamin B. Fay,
Lucius W. Conkey.

Judgment by confession was entered by Flower, Remy & Gregory (Graves' Rec., 166) on this $27,000 Graves note, and on the judgment notes in favor of the Commercial National Bank of Dubuque, the Dubuque County Bank (Graves' Rec., 179), and the Importers and Traders National of New York in the court below, on January 22, 1883, executions were immediately issued thereon, and returned by the marshal wholly unsatisfied on the same day.

On January 23, 1883, the Commercial National Bank of Dubuque, Julius K. Graves, the Dubuque County Bank and the Importers and Traders National Bank of New York, by Flower, Remy & Gregory, their solicitors (Graves' Rec., 235), filed a creditor's bill in the court below, based upon said confessed judgments, and executions, against Benjamin B. Fay

and Lucius W. Conkey, all returned *nulla bona*. In this creditor's bill, which will hereafter be designated as the first creditor's bill, the complainants say that:

Their bill is not exhibited in collusion (Graves' Rec., 236) with the defendants, that various other parties have recovered judgments for over $90,000 against said defendants in the Superior court of Cook county; that executions issued thereon have been levied by the sheriff upon the stock of merchandise of said defendants; that the property so levied upon constitutes all the tangible assets of said defendants liable for sale on execution, and is not of value sufficient to satisfy said execution; that said defendants have, during the past four or five years, been carrying on the business of wholesale grocers in the city or Chicago, and have, in said business, sold large quantities of merchandise on credit; that the notes and accounts so existing in favor of said defendants amount to $200,000, and constitute a fund which your orators are unable to reach by executions at law, but which ought in equity to be collected and applied toward the satisfaction of your orators' said judgments. And your orators (Graves' Rec., 237) further allege that said defendants (Fay & Conkey) have, since contracting the indebtedness upon which your orators' said judgments were obtained as aforesaid, put out of their hands, names and possession by some pretended sale, assignment, conveyance or gift, or by some other secret or cunning device or contrivance, divers other such real or personal property, with intent to deceive, hinder or delay, and defraud your orators of their said judgments, and other creditors of their just demands. All of which property is held in secret trust by the person or persons to whom the same has been so transferred, and with the private understanding that the same, or some interest therein, belongs of right, and shall inure to the benefit of said defendants.

This pretended creditor's bill prays for the appointment of a receiver, and is signed (Graves' Rec., 238), as follows:

THE COMMERCIAL NATIONAL BANK OF DUBUQUE, IOWA,
JULIUS K. GRAVES,
DUBUQUE COUNTY BANK OF DUBUQUE, IOWA,
IMPORTERS AND TRADERS NATIONAL BANK OF NEW YORK,
By FLOWER, REMY & GREGORY,
Their Solicitors.

J. M. FLOWER,
Of Counsel.

And the bill is verified by the affidavit of Curtis H. Remy.

Bradford Hancock Appointed Receiver.

On Tuesday, January 23, 1883, this pretended creditor's bill was filed in the court below (Graves' Rec., 239), when the following order was entered by Judge Blodgett:

The motion for the appointment of a receiver in this case having come on to be heard, and the solicitors for the complainants having been heard thereon, the said defendants appearing in open court in their own proper persons on said motion, now, on motion of Flower, Remy & Gregory, solicitors for the complainants, it is ordered by the court that Bradford Hancock be and he is hereby appointed receiver of all the property, equitable interest, things in action, and effects of the defendants, Benjamin B. Fay and Lucius W. Conkey belonging or in any way appertaining to them at the time of the commencement of this action, to wit: on the 23d day of Jauuary, 1883. * * *

In regard to the appointment of Bradford Hancock, receiver, Mr. Fay testified as follows (Graves' Rec., 300):

Q. Mr. Fay, did you on the 23d of January, 1883, appear in open court, and consent to the appointment of Bradford Hancock as receiver? A. I did.

Q. At whose request did you go there? A. Well, I did not know where to go until I was instructed.

Q. Who instructed you? A. My attorneys.

Q. Who were they? A. Flower, Remy & Gregory.

Q. Did you read the bill they had filed against you—a creditor's bill? A. I think I did.

Q. Did you file any answer to that bill? A. I do not recollect exactly what I did.

Q. You did whatever they told you to do? A. I could not give an intelligent explanation of the whole business.

It is admitted in the record that Bradford Hancock is a brother-in-law of Mr. Flower. Mr. Hancock was called on September 4, 1883, as a witness for the complainant, with the view of tracing the assets of the limited partnership, when he testified as follows:

I am fifty-one years of age. I am in commission business. I was appointed receiver for Fay & Conkey January 23, 1883.

Q. By Mr. Manning to Mr. Hancock. (Graves' Rec., 658.) By what court were you appointed?

Mr. Flower instructed witness not to answer the question.

Q. Do you comply with the request of Mr. Flower—not to answer the question? A. Yes, sir.

Q. Who first spoke with you about being receiver in this case?

Mr. Flower instructed witness not to answer.

Q. Have you in your custody the books of account that came into your hands as receiver of Fay & Conkey? A. I decline to answer.

Second Creditor's Bill Filed.

On January 24, 1883, Flower, Remy & Gregory, claiming to be the solicitors for the Bay State Sugar Refining Company, Martha J. Fay, the First National Bank of Westborough, Mass., Addison G. Robinson, Alvin F. Shumway, Hiram A. Sheldon, and Walter Potter, filed in the court below another creditor's bill, which we will hereafter designate as the second creditor's bill against Benjamin B. Fay and Lucius W. Conkey, this being also based upon judgments confessed by Fay & Conkey in their favor, on January 22d and 23d. In this second bill the complainants charge that Fay & Conkey have real estate and other property which they keep concealed, or of which the title is held in trust for them. This bill also alleges that Fay & Conkey have for several years last past been engaged in business as wholesale grocers, and have about two hundred thousand dollars due them for merchandise sold on credit—also prays for the appointment of a receiver, and is also verified by the affidavit of Curtis H. Remy, on January 24, 1883. (Graves' Rec., 246, 249.)

In this second suit, Fay & Conkey were personally served with summons by the marshal on January 24, 1883, and on the same day Judge Blodgett entered the following order (Graves' Rec., 250):

"The motion for the appointment of a receiver in this case having come on to be heard, and the solicitors for the complainants having been heard thereon, now, on motion of Flower, Remy & Gregory, solicitors for com-

plainants, it is ordered by the court, Hon. Henry W. Blodgett presiding, that Bradford Hancock be and he is hereby appointed receiver of all the property, equitable interest, things in action, and effects of the defendants Benjamin B. Fay and Lucius W. Conkey, belonging or in any way appertaining to them, at the time of the commencement of this action, to wit: on the 23d day of January, 1883."

By the foregoing we have shown, that in two days, by the manipulations of Julius K. Graves, L. J. Gage, Benjamin B. Fay, Lucius W. Conkey, and Flower, Remy & Gregory, the entire assets of the limited partnership of Boies, Fay & Conkey, of the value of about $400,000, are practically all turned over to the special partner Graves and the First National Bank of Chicago, and not one dollar's worth left for the *bona fide* creditors of the firm.

Well may Graves, Gage, Remy and Fay exult over the result of their two days' efforts. They have the sheriff in full possession of the Boies, Fay & Conkey store and stock of merchandise, and on their theory of the case, Bradford Hancock as receiver in possession under these two fraudulent creditors' bills of all the outstanding indebtedness due the firm, and duly authorized to collect it.

Doubtless Graves and Gage congratulated each other on this seeming victory over the firm creditors, and awarded due credit to Flower, Remy & Gregory for their remarkable ability to successfully represent all of the plaintiffs and all of the defendants in the twenty-two suits at law which they had brought; and all the complainants, and all the defendants in the two creditors' bills in chancery in the court below.

Possibly they may have had a little anxiety as to what the firm's merchandise creditors, and the holders of the limited partnership paper sold through Beveridge & Dewey, would do when their accounts and notes matured; but it seems they were willing to take their chances of sustaining their unlawful

preferances, as is shown by J. K. Graves testimony (Graves' Rec., 1065):

C. Q. (To J. K. Graves): You made up your mind on January 20, 1883, to get preferences, if possible, over other creditors, and then take your chances of sustaining them? A. Your question is answered by saying, that I felt that the parties who had discounted paper bearing my endorsement were entitled to preference. I had no question about its legality then, nor have I ever had since, nor have I now.

Mr. Remy also testified on this point as follows:

Q. (By Mr. MANNING to Mr. Remy, Graves' Rec., 865). On this Saturday, January 20, 1883, when you say Graves and Fay came to you and agreed that the firm was insolvent, did you suggest to them, or either of them, the propriety of applying to the court under the limited partnership act, to have a trustee appointed to close up the business of the firm, and to pay out the proceeds *pro rata* among all the creditors of the partnership? A. The counsel. is asking me to state what advice I gave to clients for whom I was acting in a confidential relation at that time. I will state the fact, that there was no such conversation or talk. I was directed to procure this confession of judgment and protect the paper upon which Mr. Graves was the endorser or guarantor.

Q. And willing to take the chances of sustaining them, were you? A There was no discussion with reference to any chances to sustain them, or any doubt about it.

Under these two appointments as receiver of the property of B. B. Fay and L. W. Conkey, Bradford Hancock, under the direction of Flower, Remy & Gregory, assumed to be authorized to, and did collect and actually receive, from January 23, 1883, the day of his appointment, to March 1, 1883, the day the Corbin bill was filed, $61,555.05 of the outstanding indebtedness due to the limited partnership of Boies, Fay & Conkey, on January 22, 1883. And during the same time, Flower, Remy & Gregory, claiming or assuming to be the attorneys of said Hancock, receiver, collected from such indebtedness, $2,723.00, as shown by the master's report. (Bank Rec., 28.)

As we have already shown, the sheriff realized on the exe-

cution in favor of the First National Bank of Chicago, $42,-231.50 (Graves' Rec., 811) and on the execution in favor of J. K. Graves, $9,791.18, and these amounts were in the hands of the sheriff until February 24, 1883. About this date the creditors of the limited partnership began their investigation for the purpose of ascertaining what had become of the firm's assets, and were about taking steps to prevent the sheriff from paying over to the First National Bank, and J. K. Graves, the money then in his hands. One creditor, Hinsdale & Yoe, was mysteriously settled with about that time, as is shown by the testimony of Mr. Yoe. (Bank Rec., 87.)

Q. About how much were they (Boies, Fay & Conkey) indebted to you at the time of the failure? A. I think at the time of the failure about $1,700.

Q. Was any portion of that account settled with you at or about the time of the failure? A. A portion of this claim having become due, suit was brought upon it, and judgment recovered against Boies, Fay & Conkey, and a creditors' bill was about to be filed, and at this time application was made to us to sell this judgment, which we did, and assigned it; but to whom, I am unable to say, and we make no claim as to that. Our only claim is as to the balance, $314.50; this is the portion of the claim that had not matured at the time suit was brought, as I have already stated.

Mr. Remy says (Graves' Rec., 859):

I told the chief deputy sheriff, a few days before the money was paid, that I wanted the sale closed up and the money paid over.

Q. What was the particular haste about getting the money? A. Well, the First National Bank do a banking business, and loan money for interest, and Mr. Gage wanted the money.

Q. Was Mr. Gage urging you to urge the sheriff? A. Yes, sir.

Q. Did you have a messenger at the court house during the two days before this money was paid over, watching to see if an application was made for an injunction to restrain this money in the sheriff's hands? A. I don't recollect.

Q. Will you swear that there were not some directions given to some one of your employes, in substance, as I have stated? A. I might have said to Mr. Tenney that I had heard it said that some one was going to enjoin the sheriff from paying this money over, and to notify me if any bill of that kind was filed.

On February 24 and 26, 1883, after "some one" had bought up the Hinsdale & Yoe judgment, Flower, Remy & Gregory succeeded in getting the sheriff to pay over to them, as proceeds of sales of the goods of the limited partnership, $52,026.68, and they endorsed on the execution in favor of the First National Bank of Chicago, as follows (Graves' Rec., 264):

CHICAGO, February 24th, 1883.

Received on within execution from Seth F. Hanchett, sheriff, Forty-two Thousand Two Hundred Thirty-one 50/100 Dollars in full satisfaction thereof.

FLOWER, REMY & GREGORY,
Plaintiff's Attorneys.

On February 26, 1883, Flower, Remy & Gregory, as the attorneys for Julius K. Graves, endorsed on the execution in his favor as follows (Graves' Rec., 261):

FEBRUARY 26th, 1883.

Received on within execution Ninety-seven Hundred and Ninety-one 18/100 Dollars, and Four Dollars advanced costs.

FLOWER, REMY & GREGORY,
Plaintiff's Attorneys.

About this date the claim of the complainant, Corbin, was put into the hands of his solicitor, at Chicago, for collection, and Bradford Hancock, then acting as receiver for Fay & Conkey, declined to give any information in regard to his appointment, or to permit an examination of the firm's books. Mr. Hancock testified as follows (Bank Rec., 152):

Q. (By Mr. MANNING.) Mr. Hancock, you remember the circumstance, do you not, of my coming to your office for the purpose of looking at the books of Boles, Fay & Conkey, shortly prior to bringing this suit of Corbin's in February, 1883? A. I remember of your coming to my office to see the books.

Q. And that you declined me access to them? A. Yes, sir.

Q. Who directed you to decline me access to the books at that time? A. Flower, Remy & Gregory.

Corbin Bill Filed.

On March 1, 1883, two days after the sheriff had paid over this large sum of money to Flower, Remy & Gregory, the the complainant Corbin's bill was filed, and the First National Bank, Boies, Fay, Conkey, Flower, Remy, and Gregory on the same day served with process. (Graves' Rec., 18.)

Immediately on being served with summons in this case, Flower, Remy & Gregory and Graves, with the view, and with the determination of carrying out their fraudulent scheme of getting all the money realized by Bradford Hancock as receiver, from the outstanding indebtedness due to the limited partnership, decided, notwithstanding the allegation in the Corbin bill, charging that the confessions of judgment by Fay & Conkey in favor of J. K. Graves, the Commercial National Bank of Dubuque, the Dubuque County Bank, and the Importers and Traders National Bank, were fraudulent and void, to make an effort to get Judge Blodgett to enter an order directing Hancock, receiver, to pay these four fraudulent judgments in full out of the money then in his hands as proceeds of his collections of the Boies, Fay & Conkey accounts. On the 5th day of March, 1883, Mr. Fay was served with the following notice (Exhibit 1, Graves' Rec., 20):

State of Illinois, } ss.
Cook County. }

In the Circuit Court of Cook County, State of Illinois. February Term, 1883. In Chancery.

Chester C. Corbin }
vs. }
William A. Boies and others. }

Mr. Benjamin B. Fay, one of the above named defendants.

Sir: Please take notice that on the twelfth day of March, A. D. 1883, at ten o'clock A. M., and to continue from day to day if necessary, at room 29, No. 162 Washington street, in Chicago, in the county of Cook and State of Illi-

nois, before Charles S. Cutting, a notary public, or some other officer authorized by law to take depositions in such cases, we shall proceed to cause to be taken the depositions of William A. Boies, Lucius W. Conkey, Benjamin B. Fay, Bradford Hancock, of said Cook county, to be read in evidence on the trial of the above entitled cause, on the part of said plaintiff, when and where you may attend and cross-examine the said witnesses if you shall see fit so to do

Dated this 6th day of March, 1883.

WM. J. MANNING,
Attorney for Complainant.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

Ben. H. Sinks, being duly sworn, on oath says that he served the within notice on the within named Benjamin B. Fay by delivery (delivering) to him a true copy thereof at Chicago on the 6th day of March, 1883.

BEN. H. SINKS.

Subscribed and sworn to before me this 12th day of March, 1883.

[SEAL.] BENJ. F. CUMMINS,
Notary Public, Cook County, Illinois.

A like notice was also served on Mr. Boies, Mr. Conkey and Mr. Hancock.

ORDER OBTAINED BY MR. FLOWER, MARCH 10, 1883.

On the next day after the service of these notices, March 7, 1883, Flower, Remy & Gregory prepared a decree to be entered in each of said creditor's bills.

In the first creditor's bill, the decree (Bank Rec., 136), directs Bradford Hancock, "to pay to the

Commercial National Bank of Dubuque.....	$14,969 00
To Julius K. Graves.....	28,356 65
To the Dubuque County Bank.....	12,501 65
To Importers and Traders National Bank.....	16,806 65

together with interest on each of said sums as aforesaid from January 22, 1883, and that he (Hancock) take the complainant's receipts therefor, and also from each of them an acknowledgment of satisfaction of their respective judgments upon which this decree is based, and file the same with the clerk of

this court to the end that said judgments may be canceled and discharged of record."

In the second creditor's bill (Bank Rec., 138), a decree was also prepared by Flower, Remy & Gregory, directing Hancock after paying in full the decree in the first creditor's bill, to distribute the balance of the money remaining in his hands as receiver, *pro rata* to the several complainants in the second bill.

On the bottom of both of said decrees is written the following (Bank Rec., 137–140):

We hereby consent to the entry of the above decree forthwith.

BENJAMIN B. FAY,
LUCIUS W. CONKEY.

Dated March 7, 1883.

On March 10, 1883, Mr. Flower without previous notice to complainant Corbin's solicitors, attended before Judge Blodgett, and on some representation got him to write on both these decrees "enter H. W. B."; and Bradford Hancock on the same day executed and delivered to Flower, Remy & Gregory, and Julius K. Graves, his five checks on the First National Bank of Chicago, aggregating $65,719.10, and took from Graves a receipt, which checks and receipt read as follows, (Bank Rec., 142, and Graves' Rec., 677, 678):

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

Commercial National Bank of Dubuque *et al.*
vs.
Benjamin B. Fay and Lucius W. Conkey.

Received of Bradford Hancock, the receiver in the above entitled suit, pursuant to the decree and order of said court this day entered, his check upon the First National Bank of Chicago, to the order of the several complainants in this suit, as follows, to wit: A check to the order of the Commercial National Bank of Dubuque for $12,825, check number 1; check number 2 to the order of Julius K. Graves for $24,300; check number 4 to the order of the Importers and Traders Bank of New York for $14,400, the several sums above mentioned being 90% of the damages recovered by us respectively in four judgments severally entered in favor of each of us in the Circuit court of the United States for the Northern district of Illinois, on the 22d day of January,

1883. Upon payment to us of the balance due upon said judgments, we severally agree to execute and deliver satisfaction in writing of our respective judgments.

COMMERCIAL NATIONAL BANK OF DUBUQUE,
By J. K. GRAVES.
DUBUQUE COUNTY BANK,
By J. K. GRAVES.
IMPORTERS AND TRADERS BANK OF NEW YORK,
By J. K. GRAVES.
JULIUS K. GRAVES.

Dated Chicago, March 10, 1883.

No. 1. CHICAGO, Mch. 10th, 1883.
The First National Bank of Chicago: pay to the order of Julius K. Graves Twenty-four Thousand Three Hundred Dollars.
$24,300.00. BRADFORD HANCOCK, *Receiver*.
Endorsed: J. K. GRAVES.

No. 2. CHICAGO, March 10th, 1883.
The First National Bank of Chicago: pay to the order of Commercial Nat'l. B'k., Dubuque, Twelve Thousand Eight Hundred Twenty-five Dollars.
$12,825.00. BRADFORD HANCOCK, *Receiver*.

No. 3. CHICAGO, March 10, 1883.
The First National Bank of Chicago: pay to the order of Dubuque County Bank, Ten Thousand Seven Hundred & Ten Dollars.
$10,710.00. BRADFORD HANCOCK, *Receiver*.

No. 4. CHICAGO, March 10, 1883.
The First National Bank of Chicago: pay to the order of Importers and Traders Bank, N. Y., Fourteen Thousand Four Hundred Dollars.
$14,400.00. BRADFORD HANCOCK, *Receiver*.

No. 5. CHICAGO, March 10th, 1883.
The First National Bank of Chicago: pay to the order of Flower, Remy & Gregory, Thirty-four Hundred Eighty-four 10/100 Dollars.
$3,484.10. BRADFORD HANCOCK, *Receiver*.
Endorsed: For deposit in the First National Bank, to the credit of Flower, Remy & Gregory.

These checks, Mr. Hancock says (Graves' Rec., 669), were filled out by Mr. Flower, and I signed them in Flower, Remy & Gregory's office.

Let us now see how, by whom and under what circum-

stances these two decrees were prepared by Flower, Remy & Gregory on March 7th, the next day after Mr. Fay and Mr. Hancock were notified to attend as witnesses in the Corbin case.

Mr. HANCOCK testified as follows (Bank Rec., 141):

Q. Both of these decrees were procured by your directions, were they, Mr. Hancock? A. I presume so.

Q. Do you know why it was that the consent to the entry of this decree was written as follows, by Benjamin B. Fay and Lucius W. Conkey: "We hereby consent to the entry of the above decree forthwith"? A. No, sir; I do not.

Q. Was that done by any direction of yours? A. No, sir.

By Mr. FLOWER: *I did that myself; both these memoranda are in my handwriting; I procured the signatures and got the decree entered, not for the receiver but for the judgment creditors. The receiver had nothing to do with it, except to pay out the money upon the orders of court.*

Q. By Mr. MANNING: Did you, Mr. Flower, at the time you procured this order, advise the court that all the judgments on which you asked the money were alleged to be fraudulent and void? A. (By Mr. FLOWER): Do you want an answer as a lawyer, or as a witness?

Q. (By Mr. MANNING): I want an answer right there, at that point? A. (By Mr. FLOWER): Well, I will say that I did not.

At this point in the examination of Mr. Hancock as a witness, the notice dated and served on March 6, 1883, or subpœna served on Mr. Fay was shown to Mr. Hancock (Bank Rec., 141), when he was asked:

Q. Mr. Hancock, did the service of the subpœna I have just read have anything to do with hurrying up the application to have the fund distributed in this court under the order just read? A. Not that I am aware of; it did'nt so far as I was concerned.

Q. Flower, Remy & Gregory were your attorneys at that time, were they not? A. Yes, sir.

Q. (Bank Rec., 135.) Do you know why the application was made to Judge Blodgett rather than to Judge Drummond to distribute this $60,000? A. I do not, any further than I supposed this case was before Judge Blodgett.

Q. (To Mr. Hancock, Bank Rec., 128, 129.) When, if ever, and what was the first occasion of your employing Flower, Remy & Gregory to act as

your attorneys as receiver? A. I employed them about the time I was appointed.

Q. What advice did you first need in relation to your appointment as receiver? A. I don't remember.

Q. Do you remember that you needed any advice? A. I don't remember of any particular advice I needed at that time.

Q. What was the first thing that you, as receiver, found it necessary to employ an attorney to do? A. I don't remember.

Q. Do you know when you first employed them? A. No, I don't recollect now.

Q. Which member of the firm did you first see with reference to employing them? A. I don't recollect that, either.

Q. What did you say to them? A. I couldn't tell.

Q. What case did you talk to them about? A. I don't remember.

Q. Did you talk to them about any case? A. I couldn't state.

Q. When did you first put any accounts into their hands for collection as receiver? A. I don't recollect.

Q. Is there any way you can tell? A. I think we have a book somewhere that —

Q. Will you please produce that book? A. I don't know where it is.

In regard to giving this $3,484.10 check, No. 5, to Flower, Remy & Gregory, Mr. Hancock testified as follows (Graves' Rec., 669, 670):

Q. What was this check to Flower, Remy & Gregory, $3,484.10, given for? A. For disbursements and fees, I suppose.

Q. From whom did you obtain that information? A. Mr. Flower, I presume.

Q. What fees was that in payment of? A. Fees, I suppose, entered up in the judgments in these cases—it was included, I suppose, in the judgments rendered.

Q. Not for any services rendered you? A. No, sir.

Q. That $3,484.10 you understand is in addition to the $1,927.96 which appears on page 287 in city cash-book "B," and about which you previously testified, as money in their hands at the time you were appointed? A. Yes, sir.

Q. (Graves' Rec., 666.) Did Mr. Flower tell you at the time you were appointed as receiver the firm of Flower, Remy & Gregory held as funds belonging to Fay & Conkey $1,927.96? A. No, sir.

Q. Did you ever ask him to pay it over to you, as receiver? A. No, sir.

For the purpose of showing how generous Mr. Hancock, as receiver, was with Flower, Remy & Gregory, we call atten-

tion to his testimony, given (Graves' Rec., 678) on December 29, 1883—nearly one year after his appointment.

Q. (By Mr. Manning.) Mr. Hancock, it has now been about a week since you were examined, when I asked you with reference to the collections made by Flower, Remy & Gregory for you. Will you please tell me the total amount collected by Flower, Remy & Gregory for you since your appointment as receiver in this case, and the total amount paid to them for their service up to this time? A. They sent me a statement in gross, saying they have collected $6,112.15, and they have charged me with $6,956.67.

On March 24, 1883, William A. Boies, Benjamin B. Fay and Lucius W. Conkey were again subpœnaed (Graves' Rec., 1,225, 1,229) to attend and testify in this Corbin case on April 4, 1883, and on March 31, 1883, Bradford Hancock was served (Graves' Rec., 1,224) with a subpœna *duces tecum* requiring him on April 4, 1883, to attend and testify and produce "all the books of account now in your possession that were owned and used by Boies, Fay & Conkey, in connection with their business as wholesale grocers in the city of Chicago from the 30th day of March, 1882, to the 1st day of March, 1883; said Hancock and each of the others served being paid and each accepting $1.10 as their witness fees—these fees being paid by the complainant so that if they failed to attend, attachments for contempt might be issued against them.

On March 26, 1883, two days after the service of these writs —Bradford Hancock, without notice to complainant, executed and delivered to Julius K. Graves four additional checks on the First National Bank of Chicago. Said checks read as follows (Graves' Rec., 676):

No. 6. CHICAGO, March 26, 1883.

The First National Bank of Chicago, pay to the order of Julius K. Graves twenty-nine hundred and thirty-two and 56/100 dollars.

$2,932.56. BRADFORD HANCOCK, *Receiver*.

Endorsed: Julius K. Graves.

No. 7. CHICAGO, March 26, 1883.

The First National Bank of Chicago, pay to the order of Commercial National Bank of Dubuque, fifteen hundred and seventy-one and 49/100 dollars.

$1,571.49. BRADFORD HANCOCK, *Receiver*.

No. 8. CHICAGO, March 26, 1883.

The First National Bank of Chicago, pay to the order of Dubuque County Bank twelve hundred and ninety-two and 38/100 dollars.

$1,292.38. BRADFORD HANCOCK, *Receiver*.

Endorsed: Dubuque County Bank by J. K. Graves. J. K. Graves. Pay Hide & Leather National Bank, Chicago, or order for credit Commercial National Bank of Dubuque, Iowa. C. H. Harris, cashier. Pay through the clearing house to Hide & Leather National Bank, Chicago, Illinois, April 26, 1883.

No. 9. CHICAGO, M'ch 26th, 1883.

The First National Bank of Chicago: pay to the order of Importers' & Traders' Bank, N. Y., Seven Hundred Twenty-six & 81/100 Dollars.

$726.81. BRADFORD HANCOCK, *Receiver*.

On the same day, March 26th, Hancock took from J. K. Graves four receipts for said checks, which receipts read as follows (Bank Rec., 143–4):

Received of Bradford Hancock, the receiver in the above entitled cause, pursuant to an order and decree of said court, the sum of Two Thousand nine hundred and thirty-two and 56/100 Dollars, in full of the balance due upon a judgment rendered in my favor against the defendants above named, on the 22nd day of January, 1883.

CHICAGO, March 26th, 1883. J. K. GRAVES.

Received of Bradford Hancock, the Receiver in the above entitled cause, pursuant to an order and decree of said Court, the sum of One thousand Five Hundred seventy-one and 49/100 Dollars, in full of the balance due us upon a judgment entered in our favor, against the defendants above named, on the 22nd of January, 1883.

COMMERCIAL NATIONAL BANK,

CHICAGO, March 26th, 1883. By J. K. GRAVES.

Received of Bradford Hancock, the Receiver in the above entitled cause, pursuant to an order and decree of said court, the sum of One Thousand Two Hundred and Ninety-two and 38/100 Dollars, in full of the balance due us upon a judgment entered in our favor, against the defendants above named, on the 22nd day of January, 1883.

DUBUQUE COUNTY BANK,

CHICAGO, March 26th, 1883. By J. K. GRAVES.

Received of Bradford Hancock, the Receiver in the above entitled suit, pursuant to an order and decree of said court, the sum of Three hundred and Twenty-six and 81/100 Dollars, in full of the balance due upon a judgment entered in our favor, against the defendants above named, on the 22nd day of January, 1883.

IMPORTERS' & TRADERS' NATIONAL BANK, New York,
By J. K. GRAVES.

Mr. Hancock was examined in reference to his acceptance of such receipts, and testified as follows (Bank Rec., 142):

Q. Did he (J. K. Graves) show you any authority from the Dubuque County Bank, the Commercial National Bank, or the Importers' and Traders' National Bank, for receipting for the money? A. I don't think he did.

Q. Do you know whether he did or not? A. I don't think he did.

Q. You didn't ask him to show any authority, did you? A. I think not; I think Mr. Flower was present.

Q. (Bank Rec., 144.) Did you report to the court, and ask direction whether it would be proper for you to make these payments to him (J.K. Graves) and take his receipt? A. No, sir.

Q. Have you any paper signed by any one in behalf of Commercial National Bank, the Dubuque County Bank, or the Importers and Traders National Bank, acknowledging the satisfaction of their judgments? A. I don't know that I have.

Q. You never remember of having any, do you? A. I don't remember of having any.

Q. You don't remember ever asking for it from anybody, do you? A. No, sir.

Q. Did you ever petition and ask the court whether it would be proper for you to make these large payments, without such satisfaction piece being produced at the time you made the payment? A. No, sir.

Q. (Bank Rec., 146.) Did it ever occur to you the propriety of having some (other) attorneys, if Flower, Remy & Gregory wouldn't do it, petition the court before these payments were made, and inform the court that the judgments which they sought to have paid, were all alleged to be fraudulent and void, under the limited partnership act of Illinois? A. No, sir.

Q. You were willing to leave the whole thing to Flower, Remy & Gregory, were you not? A. I was appointed on a creditors' bill. They represented the creditors, and I supposed I carried out the order of the court.

Q. You had no more concern about it? A. No, sir.

Q. Didn't care whether the judgments were good or bad? A. Don't think I was particularly interested.

Q. Did you care? A. I don't think I did.

Sale of Boies, Fay & Conkey Books by Hancock.

Not content with so wrongfully, and as we claim, unfairly, paying over this large sum of money to Julius K. Graves and Flower, Remy & Gregory, Mr. Hancock, after so being served with a *subpoena duces tecum* to produce the firm's books, deliberately sold many of the books and papers desired to Bradner Smith & Co. to be ground up as waste paper.

On this point Mr. Hancock testified as follows:

Q. (Graves' Rec., 671.) It appears by the testimony of Mr. Vaughan, who was employed by you after your appointment, that quite a number of the books of the firm were sold to Bradner Smith & Co. Was that done at your direction? A. Yes, sir.

Q. (Graves' Rec., 672.) Did you apply to the court for leave to sell these books? A. No, sir.

The expert book-keeper, Mr. Weinschenk, testified in regard to the missing books, in substance, as follows (Graves' Rec., 457):

I found on my examination that certain books of account of Boies, Fay & Conkey were missing, namely: The check books on the First National Bank of Chicago. The bills payable book of notes falling due prior to July, 1882, the cash book balance statement in use at the date of the suspension, and the firm's deposit books showing deposits made in the First National Bank and the Importers & Traders National Bank.

Mr. Vaughan testified in regard to the missing books, as follows (Graves' Rec., 405):

Q. Mr. Vaughan, where is the bills payable book prior to July, 1882? A. I could not tell where it is.

Q. When did you last see it? A. I think it was sold with all the rest of the books.

Q. Did you sell them? No; Mr. Hancock sold them. I saw them all delivered and weighed.

Q. (Graves' Rec., 417) Have you found the daily cash book, about which I asked you the other day? A. No sir; I have not.

Q. Do you remember whether it was with the lot sold, or not? A. I think I have destroyed it.

Q. And if you destroyed it, you did it by tearing it up? A. Tearing it up.

Q. Where did you leave the fragments of it, if you tore it up? A. The waste paper basket in Mr. Hancock's office.

Q. (Graves' Rec., 418). By whom were you employed when you destroyed it? A. By Bradford Hancock, receiver in this case.

Q. Then if I understand you correctly, Mr. Vaughan, when the bank book of Boies, Fay & Conkey was left at the First National Bank to be written up, it was left with Mr. Gage, was it? A. No, sir, I presume it was left with the book-keeper.

Q. And neither the bank book nor the vouchers have been returned to Boies, Fay & Conkey? A. I think not.

Q. (Graves' Rec., 416.) Have you, since the book was left there, made inquiry? A. I have at the bank.

Q. Of whom? A. Mr. Gage, and the book-keeper.

Q. What reply has been given you with reference to the book? A. Mr. Gage said he would look into the matter and see if he could find it.

Q. (Graves' Rec., 422.) Mr. Vaughan, did the firm keep letter press copies of letters written by them? A. They did; yes, sir.

Q. Where are they? A. The books from the earliest class were sold, and the last one is at Bradford Hancock's office.

Q. There is but one of the letter press books there? A. That is all I have been able to find.

Q. The balance of them were sold by direction of Mr. Hancock? A. Yes, sir.

Q. To whom were they sold? A. Bradner Smith & Co.

PERRY KRUS testified in substance as follows (Graves' Rec., 682–684):

I have charge of buying paper stock, rags and papers for Bradner Smith & Co. In April, 1883, I bought some Boies, Fay & Conkey books of Bradford Hancock; these books were sent to paper mills and ground over again.

Q. (Graves' Rec., 684.) You are familiar with what is known as a bank deposit book, are you not? A. Pass-book; yes, sir.

Q. And checks on banks returned when the bank books are written up? A. Yes, sir.

Q. Do you recollect seeing any such books as that among the books you bought? A. I think there were.

Q. Do you recollect seeing a book which would be denominated as stub of a check-book? A. Yes, sir; I think I did.

OTTO F. SOHN testified in substance as follows (Graves' Rec., 1232):

I am book-keeper for Bradner Smith & Co. On April 6, 1883, I weighed the Boies, Fay & Conkey books that Bradner Smith & Co. bought of Bradford Hancock.

Q. How long prior to that time—that is, how long prior to the 6th of April—had they been delivered to Bradner Smith & Co. by Hancock or his employes? A. A few days prior to April 6th.

Q. (Graves' Rec., 1233.) When did Bradner Smith & Co. pay Bradford Hancock for these books? A. April 6, 1883; $134.21.

Q. Were these books in a condition so that if, say two weeks after April 6th, any of them had been wanted they could have been got back by Bradford Hancock? A. Yes, sir.

In regard to selling these books and papers, Mr. Hancock says, in substance (Graves' Rec., 1111):

I think very likely I was, on March 31, 1883, served with a *subpœna duces tecum* in this case, to produce the Boies, Fay & Conkey books and papers, and I suppose I then knew that these books were required as evidence in this case, and that service on me was several days before I sold those books to Bradner Smith & Co.

In regard to the missing letterpress copy-books, Mr. Fay testified in behalf of the defendants, in substance as follows (Graves' Rec., 998–9):

All of our correspondence in regard to getting notes discounted at Importers and Traders National Bank, on the responsibility of J. K. Graves, was copied in letter press copy-books.

C. Q. Do you know where these letter press copy-books are? A. I do not.

C. Q. You had them, did you not, in your possession at the time of your suspension on the 22d of January, 1883? A. So far as I know.

C. Q. (Page 999.) How many letter-books do you think your firm had on hand on January 22, 1883? A. I could not tell.

C. Q. One hundred? A. Could not give you an idea.

C. Q. (Page 1000.) Do you know what became of them? A. I do not.

C. Q. Did you ever make any inquiries as to what became of them? A. I did not.

In regard to such conduct on the part of Bradford Hancock, the court below in its opinion found as follows:

(Bank Rec., 63.) "On March 31, 1883, a *subpœna duces tecum* was served upon Hancock, the receiver, to appear, on April 4th, before the examiner, with the books of the firm, and testify as a witness; and the evidence shows that after the service of this subpœna, and before the 4th day of April, he sold, as old paper, all letter press copy-books except one—the bank books, check books, and checks back of November, 1882, the cash book balance statements, and bills payable book prior to July; and other books which were regarded as important by the expert book-keeper. This fact is all the more significant as Flower, Remy & Gregory were also the receiver's counsel."

On December 12, 1885 (Bank Rec., 4, 5, 6), objections were filed to the pretended payments by Bradford Hancock to Julius K. Graves and Flower, Remy & Gregory, but before a hearing on such objections Mr. Hancock died. The suggestion of his death is shown (Bank Rec., 50), and thereafter the widow of Mr. Hancock, as his executrix, in accordance with the decree of the court below, refunded $6,650.32 (Bank Rec., 54) of the money charged by Mr. Hancock in his said reports as receiver, and Flower, Remy & Gregory (Bank Rec., 52) were decreed to and did pay over to Robert E. Jenkins, receiver, $656.32 of the money collected by them on the accounts so assigned, and delivered to him those remaining uncollected—about $8,000.

Consideration of Confessed Judgments.

The original bill in this case charges that some of the judgments confessed are fictitious and founded upon no valuable consideration, and that others were entered for a much greater sum than was actually due. (Graves' Rec., 12.)

We have shown that the John H. Lull judgment was fictitious, and entered without consideration.

We have shown that the George E. Johnson, and the Mary Murison judgments were wholly unauthorized, and entered for the purpose of entrapping the claimants into ratifying them,

and by so doing, release J. K. Graves of his liability for such indebtedness. We will now briefly investigate as to the *bona fides* of the four judgments that were paid in full by Bradford Hancock, receiver, to wit: The Commercial National Bank judgment for $14,250 and $712.50 attorney's fees. (Graves' Rec., 170.)

The Dubuque County Bank judgment for $11,900 and $595 attorney's fees. (Graves Rec., 174.)

The Importers and Traders National Bank judgment for $16,000 and $800 attorney's fees. (Graves' Rec., 178.)

The Julius K. Graves judgment for $27,000 and $1,350 attorney's fees (Graves' Rec., 165), and the Julius K. Graves judgment for $17,500 and $875 attorney's fees. (Graves' Rec., 258.)

First, we will ascertain from the record what, if any, consideration there was for the Commercial National Bank judgment. On December 20, 1883, Julius K. Graves being in Chicago, he was summoned to attend and be examined as a witness. This writ from the court below was disobeyed, and Mr. Graves was attached as a delinquent witness, by his Honor Judge Drummond. (Graves' Rec., 99.) On being brought before the court, Mr. Graves agreed to, and did testify before the examiner.

In regard to the consideration of the Commercial National Bank judgment, Julius K. Graves says in substance (Graves' Rec., 360):

I am a director and a stockholder in that bank. On Monday, January 22, 1883, in Flower, Remy & Gregory's office (p. 363) I asked B. B. Fay and L. W. Conkey for the judgment in favor of the Commercial National Bank; also for the judgment in favor of the Importers' and Traders' National Bank of New York; also for the judgment in favor of the Dubuque County Bank; also for two judgments in my own name, one for $27,000 and one for $18,000.

I think I have the vouchers here upon which I asked for these judgments, in favor of the Commercial National Bank. When asked for them he pro-

duced and handed to counsel the following (Graves' Rec., 364): One check of the firm No. 24,127 (heretofore shown) dated January 24, 1883, payable to J. K. Graves for.....$ 2,000 00

The four accommodation notes (heretofore shown) for $2,500 each, given him by Fay & Conkey, dated December 4, 1882, payable in two, three, four and five months..... 10,000 00

The $766.66 note (heretofore shown) dated December 4, 1882, payable in ninety days, given for balance he claimed on his $10,000 per year..... 766 66

One of the $1,250 drafts made on J. K. Graves by Fay & Conkey on January 20, 1883, to pay Flower, Remy & Gregory's fees..... 1,250 00

Making a total of.....$ 14,016 66

Q. (Graves' Rec., 365. By Mr. Manning to J. K. Graves.) Are these the papers upon which the Commercial National Bank's judgment was based?

A. These are the papers, as I understand it, on which this judgment was based.

What a showing on which to base a judgment for $14,250 and $712.50 attorneys' fees!

The $2,000 check, being one of those heretofore shown to have been held by J. K. Graves, dated ahead, and dated two days after the failure.

The four $2,500 notes, none of them due, and given solely for the accommodation of J. K. Graves. The $766.66 note given as a pretended balance due J. K. Graves, for his share of the profits of the firm of Boies, Fay & Conkey for eight months from March 30, 1882, to November 30, 1882, during which time the firm lost over $50,000.

And lastly, and more outrageous than all, one of the $1,250 Fay & Conkey drafts, voluntarily paid by J. K. Graves, as a retainer fee to Flower, Remy & Gregory on January 20, 1883.

Comment on such a fraudulent transaction is unnecessary!

We will next call attention to the confessed judgment by Fay & Conkey in favor of the Dubuque County Bank, and ascertain from the record what, if any consideration there was

for it. This judgment is for $11,900, and $595 attorneys' fees.

Julius K. Graves, being asked to produce the vouchers on which he asked for this judgment, said (Graves' Rec., 370, 374):

I think these are the papers—Mr. Graves producing and handing to counsel the following:

$5,000. DUBUQUE, Iowa, January 4, 1883.

One month after date, we promise to pay to the order of J. K. Graves, five thousand dollars, at Dubuque County Bank of Dubuque, value received, with interest at ten per cent. per annum after due until paid, and if suit is brought for the collection of this note, a reasonable attorney's fee shall be allowed and taxed with the costs in such suits.

FAY & CONKEY.

Due February 4–7, 1883.

No. 24,126. CHICAGO, January, 20, 1883.

The First National Bank of Chicago: pay to the order of J. K. Graves fifteen hundred dollars.

($1,500). FAY & CONKEY.

$1,250. CHICAGO, January 20, 1883.

At ninety days' sight, pay to the order of Flower, Remy & Gregory, twelve hundred and fifty dollars, value received, and charge to account of

FAY & CONKEY.

To J. K. Graves, Esq., Dubuque, Iowa.

(Written across the face): January 20, '83. Accepted. Payable at Commercial National Bank.

J. K. GRAVES.

No. 24,185. CHICAGO, January 26, 1883.

The First National Bank of Chicago: pay to the order of J. K. Graves, fifteen hundred dollars ($1,500).

FAY & CONKEY.

No. 24,184. CHICAGO, January 25, 1883.

The First National Bank of Chicago pay to the order of J. K. Graves, fifteen hundred dollars.

$1,500.00. FAY & CONKEY.

24,186. CHICAGO, January 27, 1883.

The First National Bank of Chicago pay to the order of J. K. Graves, one thousand dollars.

$1,000.00. FAY & CONKEY.

$ 8,376.

Q. (Graves' Rec., 371): Are these the papers, Mr. Graves, which represent, or purport to represent, the consideration for the judgment in favor of the Dubuque County Bank, of Dubuque, Iowa, entered in the Circuit court of the United States, for the Northern district of Illinois, against Fay & Conkey, on January 22, 1883? A. I think they are the papers on which the judgment obtained by the Dubuque County Bank are based.

Q. Do you know of any other consideration for that judgment than these papers? A. I think those are the papers.

Q. Do you know of any others? A. I recall no others.

Q. (Graves' Rec., 372): Now I will ask you, Mr. Graves, what was the consideration of the acceptance of January 20, 1883, payable to the order of Flower, Remy & Gregory, for $1,250, and signed Fay & Conkey, and accepted by you? A. Fay & Conkey asked me if I would accept a draft, so that they could make a payment of this amount to Flower, Remy & Gregory. I consented to do it, and accepted it, as shown, on January 20th.

Q. (Graves' Rec., 373.) Have you since paid this acceptance? A. Yes, sir.

Q. When did you pay it? A. At maturity; promptly like a little man, I paid it.

Let us now see what William G. Stewart, the president of the Dubuque County Bank, says.

Mr. Stewart testified as follows (Graves' Rec., 797–8):

I am and have been president of the Dubuque County Bank since its organization in 1875. The Dubuque County Bank, on January 22, 1883, held a note for $5,000, marked Exhibit 8, to Graves' deposition, and three checks, Exhibits 10, 11 and 12 to Graves' deposition, together amounting to $9,000.

Q. (By Mr. Manning to Mr. Stewart, Graves' Rec., 798): Do you find any other paper or indebtedness held by the bank on January 22, 1883, than these four pieces about which you have testified? A. None that I know of, sir.

Q. When was this paper paid, and by whom? A. Paid by Mr. Julius K. Graves, March 12, 1883, I believe.

Q. (Graves' Rec., 799): Is the check for $10,710, which I now show you, dated at Chicago March 10, 1883, on the First National Bank, payable to the order of the Dubuque County Bank, and signed Bradford Hancock, receiver, and being No. 3 of the checks made a part of Hancock's deposition, the check which paid the obligations at that time, held by the Dubuque County Bank? A. Yes, sir; that is the check.

Q. How much did the obligations of the bank at that time amount to, including interest up to date? A. The books show the obligations of the bank to be $9,000, and interest $95.97.

Q. How was the difference adjusted between you and Mr. Graves at that time? A. I paid Mr. Graves the difference.

Q. What was the amount? A. The difference would be $1,614.63; I think it was paid in currency.

Q. (Graves' Rec., 800.) Upon whose responsibility was this $9,000 negotiated with the Dubuque County Bank? A. Mr. Julius K. Graves.

Q. Did you know, or investigate into the responsibility of Fay & Conkey? A. I did not; did not know anything about them.

Q. (Graves, Rec., 803.) You looked to Graves, and Graves alone, for your $9,000, did you? A. Yes, sir.

Q. (Graves' Rec., 800.) Did the the Dubuque County Bank ever, to your knowledge, authorize the firm of Flower, Remy & Gregory to enter a judgment by confession in its favor, in the Circuit court of the United States, for the Northern district of Illinois, for the sum of $11,900, and $595 attorneys' fees? A. I have no recollection of hearing of anything of that kind.

The only foundation, then, for the judgment confessed by Fay & Conkey in favor of the Dubuque County Bank was, that Julius K. Graves owed that bank on January 22, 1883, $9,095.57. If J. K. Graves then thought that this individual debt of his to the Dubuque County Bank, could under any circumstances be a basis for a confession of judgment by Benjamin B. Fay and Lucius W. Conkey, in favor of the Dubuque County Bank, why did he not take their judgment note for $9,095.57 instead of for $11,900, and $595 attorneys' fees.

On March 10, 1883, when Julius K. Graves and Mr. Flower got Bradford Hancock's check No. 3 for $10,700, he (Graves) took this check to the Dubuque County Bank, paid to Mr. Stewart the bank's claim in full, and received in currency $1,614.63, this amount being the excess of Hancock's check over the total of the Dubuque County Bank's claim against Graves.

Not content with so unlawfully receiving and fraudulently pocketing this $1,614.63, Julius K. Graves, on March 26, 1883, under the pretense of being authorized to represent the Dubuque County Bank, persuaded Bradford Hancock, receiver,

to make his check No. 8 (heretofore shown) in favor of Dubuque County Bank for $1,282.38 for the pretended balance due said bank on its said confessed judgment, and deliver it to him (Graves), and thereupon Mr. Graves fraudulently executed and delivered to Bradford Hancock a receipt, which reads as follows (Bank Rec., 143):

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

The Commercial National Bank, The Dubuque County Bank, The Importers and Traders National Bank and Julius K. Graves,
vs.
Benjamin B. Fay and Lucius W. Conkey.
} *Creditor's Bill.*

Received of Bradford Hancock, the receiver in the above entitled cause pursuant to an order and decree of said court, the sum of one thousand two hundred and ninety-two and 38/100 dollars in full of the balance due us, upon a judgment entered in our favor against the defendants above named, on the 22nd day of January, 1883.

Dated, March 26, 1883.

DUBUQUE COUNTY BANK.
By J. K. GRAVES.

This check was received by Julius K. Graves, and this receipt given fourteen days after the Dubuque County Bank had been paid in full with Hancock's check No. 3 as heretofore shown, by Mr. Graves. Let us ascertain from the record what he did with this second check.

William G. Stewart, the president of the Dubuque County Bank, testified in his private office in the Dubuque County Bank at Dubuque, as follows:

Q. (By Mr. MANNING, Graves' Rec., 802-3.) I now show you Mr. Stewart, a check dated at Chicago, March 26, 1883, on the First National Bank of Chicago, payable to the order of the Dubuque County Bank for $1,292.38, signed Bradford Hancock, receiver, it being No. 8 of the checks, put in evidence in this case, during Mr. Hancock's examination, and ask you if you ever saw that check before, or know anything about it? A. I do not remember. Our books do not show anything of the kind ever being here.

Q. Has Julius K. Graves ever been an officer of this bank, or employed by it in any capacity that you know of? A. Not that I know of, sir—

Q. Was he ever authorized, in any way, to make the endorsement which appears upon that check—Dubuque County Bank by J. K. Graves? A. Never was by me.

Q. Since the 12th of March, 1883, when you were paid $9,000 in full, have you had any claim of any name or nature, against Fay & Conkey, with the endorsement of Graves upon it? A. I do not remember any.

Q. And you do not find any on the books? A. I do not find any on the books; no, sir.

Q. Did you, as an officer of the bank or in behalf of the bank, ever claim to be the owner of this $1,292.38 check? A. No sir.

On cross-examination by Mr. Flower, Mr. Stewart said (Graves Rec., 805):

Mr. Graves came to me with a piece of paper, and I suppose this must be the one—after I got my money—after the bank had been paid—and I declined to pay it—I declined to give him the currency on it. I never paid any currency, gentlemen, on that certificate—I remember when he (J. K. Graves) came in. I said, the bank has had their pay.

C. Q. (By Mr. Flower, Graves' Rec., 806.) Do you recollect saying to him this, Mr. Stewart: "Endorse it yourself; that will be all right." Didn't he ask you to endorse the check, and you declined to do it, or give him money on it? A. I did not give him any money on it. I have no recollection of telling him to endorse it.

Having this Hancock check payable to the Dubuque County Bank for $1,292.38 in his possession, and after Mr. Stewart, the president of that bank, had refused to cash it, or endorse it, Julius K. Graves decided to get the money on it, at all hazards; and so he, in furtherance of his fraudulent scheme, to defraud the limited partnership creditors, commits, what, if any one else had done it, would be called a forgery. He without any authority endorsed that check as follows: "Dubuque County Bank by J. K. Graves," and then sent it through the Commercial National Bank for collection—he being a stockholder and a director in that bank, and his brother Rufus E., its president, of course, the check went through all right, and was paid.

If this transaction does not verge closely on to larceny and

forgery, what words will aptly, or more correctly describe the offense? Julius K. Graves wrongfully and fraudulently received and converted to his own use on March 12, 1883, the $1,614.63, from Mr. Stewart; and thereafter in getting this Hancock check No. 8 for $1,292.38 cashed as he did, and appropriating the money to his own use, he certainly made himself liable to the charge of larceny as bailee if not of forgery.

In reference to this Dubuque County Bank matter, the court below found as follows (Bank Rec., 67):

"The judgment confessed at Graves' instance in favor of the Dubuque County Bank exceeded the indebtedness of the firm to that bank by about $3,000. The bank declined to receive more than the amount of its debt, and Graves collected and retained the excess. These circumstances are damaging to Mr. Graves' integrity."

The appellants allege that the court below erred in this finding. We respectfully submit that if there was any error in this finding, the proper assignment of such error should read as follows: The court erred in not finding that Julius K. Graves fraudulently, wilfully, and corruptly received and appropriated to his own use $2,907.01 out of the proceeds realized by him from the collection of checks Nos. 4 and 8 of Bradford Hancock, receiver, on the First National Bank of Chicago.

Next we call attention to the alleged consideration for the judgment confessed by Fay & Conkey, in favor of the Importers and Traders National Bank of New York.

We have heretofore shown that on December 12, 1882, Fay and Conkey gave their note, payable in ninety days, to the order of J. K. Graves for $5,000, payable at the Importers and Traders National Bank, and on December 18, 1882, another for $5,000, payable in ninety days to J. K. Graves, also payable at said bank; and we have also shown that on January 17, 1883, Fay and Conkey gave another $5,000 note,

payable in ninety days, to the Importers and Traders National Bank.

Mr. Fay says (Graves' Rec., 997), that these three notes represent the indebtedness for which Fay & Conkey gave to the Importers and Traders National Bank, their judgment note on January 22, 1883.

The judgment note so given by B. B. Fay and L. W. Conkey to the Importers and Traders National Bank is for $16,000, and $800 attorneys' fee, and is shown (Graves' Rec., 177).

If on January 22, 1883, it was really the intention of Fay & Conkey to secure the Importers and Traders National Bank on the two $5,000 notes they gave to J. K. Graves in December, and on the one given five days before the day of the failure to the Importers and Traders National Bank, none of them due, why did they give a note, and confess a judgment for $16,000 and $800 attorneys' fees?

It is quite apparent that it was an afterthought on their part. Evidently their scheme was to confess all these bank judgments, and the J. K. Graves judgment, and to get all the money realized thereon paid over to Flower, Remy & Gregory as the plaintiff's attorneys in all the suits, and then out of the money so realized, pay off the obligations on which Graves was liable, as they became due. In that view of the case it seemed very desirable to have Flower, Remy and Gregory act as attorneys on both sides in all the cases; for certainly then there would be no chance for a disagreement between the plaintiffs' and the defendants' attorneys.

We will next ascertain from the record what, if any, consideration there was for the $27,000 judgment, and $1,350 attorneys' fees, confessed by B. B. Fay and L. W. Conkey in the court below, in favor of their special partner, Julius K. Graves, on January 22, 1883. (Graves' Rec., 165.)

We have heretofore shown the note on which this judgment is based, and it is also shown (Graves' Rec., 164).

Julius K. Graves, when called as a witness for the defendants, was asked about this $27,000 note, when he said it was given to secure him on his endorsement (Graves' Rec., 1037–8) on four notes and one acceptance, which read as follows, and each is shown (Graves' Rec., 1079, 1080):

$5,000. CHICAGO, December 11, 1882.

Sixty days after date, we promise to pay to the order of J. K. Graves Five Thousand Dollars, at our office; value received.

(Due Feb'y 12th, 1883.) FAY & CONKEY.

$5,000. CHICAGO, December 26, 1882.

90 days after date, we promise to pay to the order of J. K. Graves Five Thousand Dollars, at our office; value received.

(Due March 29, 1883.) FAY & CONKEY.

$5,000. CHICAGO, December 26, 1882.

Sixty-five days after date, we promise to pay to the order of J. K. Graves Five Thousand Dollars, at our office; value received.

(Due March 5, 1883.) FAY & CONKEY.

$5,000. CHICAGO, December 30, 1882.

Twenty days after date, we promise to pay to the order of the First National Bank of Chicago, Five Thousand Dollars, at our office; value received.

Due Jan. 22, 1883. FAY & CONKEY.

Endorsed: J. K. GRAVES.

$7,000. CHICAGO, Jan. 15, 1883.

Ten days' sight, pay to the order of ourselves seven thousand dollars, value received, and charge the same to account of

FAY & CONKEY.

To J. K. Graves, Dubuque, Iowa.

(Written across face): Accepted, Jan. 15, 1883.

J. K. GRAVES.

Another singular circumstance about these four $5,000 notes and this $7,000 acceptance is—Graves claims his endorsement on them to be the consideration for the $27,000 judgment and $1,350 fees confessed by Fay & Conkey in his favor, and Mr. Gage claims the same notes and acceptance to

be a part of the claim held by the First National Bank on January 22, 1883. They appear on Exhibit "A" to Mr. Gage's deposition (Graves' Rec., 1070–71) as follows:

Notes of Fay & Conkey, endorsed by J. K. Graves:	
Dated December 11, 1882	$5,000
Dated December 26, 1882	5,000
Dated December 26, 1882	5,000
Dated December 30, 1882	5,000
Acceptance of J. K. Graves:	
Dated January 15, 1883	7,000
	$27,000

They are all shown in full as Exhibits "M," "N," "O," "P" and "Q" to Mr. Gage's deposition (Graves' Rec., 1,079–80), and this same $7,000 also appears and stands credited to Julius K. Graves' private account on the books of Boies, Fay & Conkey under date of January 15, 1883 (Graves' Rec., 163), and also appears as a credit on the Boies, Fay & Conkey cash-book as cash received on that day from Julius K. Graves. (Graves' Rec., 162.) This last entry indicates, that on January 15, 1883, Julius K. Graves put back, or intended at the time to put back, $7,000 of the money he had before then wrongfully drawn out of the limited partnership funds; but if that was the intention then, he changed his mind, and now this $7,000 is brought forward to represent in part the confessed judgment in his favor, and also to represent in part the claim of the First National Bank of Chicago.

It appears on the face of these papers, that none of them were due on January 22, 1883, (the day the judgment was confessed) except the $5,000 note, dated December 30, 1882, payable in twenty days to the First National Bank, endorsed by Graves; and the query again is: Why did Mr. Gage permit J. K. Graves to take up two $5,000 notes on January 20th, signed by Boies, Fay & Conkey, and endorsed by him, one seven and the other nine days before due, and allow this note

already due, signed by Fay & Conkey and endorsed by Graves, to remain unpaid?

Transactions like this could not have been successfully carried through the First National Bank of Chicago, by Julius K. Graves without previous consultation, and arrangement perfected by him with Mr. Gage.

It is certainly an unusual transaction for a failing debtor, to borrow money on the day of his failure, and with that money pay another creditor two notes not yet due, and leave unpaid in the hands of such creditor, a note then due.

We will now try to show from the record the pretended consideration for the $17,500 judgment note, and $875 attorneys' fees on which judgment was entered by confession by Flower, Remy & Gregory in the Superior court of Cook county, Illinois (Graves' Rec., 258-9) on January 22, 1883. This note reads as follows:

$17,500. CHICAGO, Ill., Jan. 22, 1883.

On demand for value received, we promise to pay to the order of Julius K. Graves, seventeen thousand and five hundred dollars at Chicago, Ill., with interest at eight per cent. per annum; and to secure the payment of said sum I authorize irrevocably, any attorney of any court of record to appear for me in said court, in term time or in vacation, at any time hereafter, and confess a judgment without process, in favor of the holder of this note for such amount as may appear to be unpaid thereon, with costs and five per cent. attorney's fees, and to waive all errors in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof.

BENJAMIN B. FAY,
LUCIUS W. CONKEY.

We have heretofore shown that on October 20, 1882, (one day after the last pretended dissolution paper was secretly signed), Boies, Fay & Conkey issued their note which reads as follows (Graves' Rec., 442):

$5,000. CHICAGO, October 20, 1882.

Ninety days after date we promise to pay to the order of ourselves five thousand dollars at our office, value received.

BOIES, FAY & CONKEY.

Endorsed: J. K. GRAVES.

This note being marked—paid, Beveridge & Dewey—furnished a key to the situation. Mr. Vaughan, on November 10, 1883, being shown this note said (Graves' Rec., 449): "I "never saw that note before—I do not know what it was given "for, and it is nowhere entered on Boies, Fay & Conkey's "books. The firm's signature on it is Mr. Fay's, and that is "J. K. Graves' signature on the back of it."

This testimony shows conclusively that Boies, Fay & Conkey never received any money as proceeds from the sale, or discount, of that note.

On April 21, 1884, when the deposition of Mr. Dewey, of the firm of Beveridge & Dewey, was being taken in their office, this October 20, 1882, $5,000 note was shown to him (Graves' Rec., 913), when Mr. Dewey said that note is one of the notes that was renewed on January 20, 1883, by Fay & Conkey, and endorsed by J. K. Graves.

What occasion could there have been for any one but J. K. Graves to either pay or renew that $5,000 note on January 20, 1883? He, individually, got that note discounted—*if it was in good faith* held and owned by Beveridge & Dewey on January 20, 1883. Boies, Fay & Conkey never received any proceeds from the sale or discount of that note, for Mr. Vaughan, their cashier, says it nowhere appears on their books.

On that January 20, 1883, when Julius K. Graves got Fay & Conkey to renew that $5,000 note, and he, Graves, again endorsed it, he, (Graves), with the aid of Fay, fraudulently got $7,000 more in cash from Beveridge & Dewey, and with it and with J. W. Doane & Co.'s check for $3,000, also fraudu-

lently obtained, at once took the Beveridge & Dewey check for $7,000 and the J. W. Doane & Co. check for $3,000 to Mr. Gage, at the First National Bank, and with them took up two $5,000 limited partnership notes before they were due; and now the pretense of Julius K. Graves is that he, on January 22, 1883, took the $17,500 judgment with $875 attorney's fees as security for his endorsement on Fay & Conkey's paper held by Beveridge & Dewey, when the facts were that the debt owing to Beveridge & Dewey was for money Graves himself got, he only using Fay & Conkey as a " cat's paw "; and to " cap the climax " and further mislead the limited partnership creditors Julius K. Graves and Curtis H. Remy, after the filing of the Corbin bill, conceived the idea of having Mr. Graves pretend to assign the two Fay & Conkey judgments so taken by confession in his favor, the one in the state court to to be secretly assigned to Beveridge & Dewey, and the one in the United States Circuit court to be secretly assigned to L. J. Gage, cashier, and this at a time when they both knew Mr. Gage was not cashier, and so, without consulting either Beveridge & Dewey or Mr. Gage, Mr. Remy had one of his clerks fill out two printed forms of assignments of judgment, and dated them back to January 24, 1883, and had J. K. Graves sign them. No witness, and no acknowledgment of either of such pretended assignments, nor was there any transfer of either of said judgments on the records of the courts where they were entered.

Pretended Assignments of Graves' Judgments.

Mr. David B. Dewey, of the firm of Beveridge & Dewey, was asked about the pretended assignment by J. K. Graves of the state court judgment to Beveridge & Dewey, and he said:

It is impossible for me to say, definitely, from whom we received it; but

my recollection is, it was sent to us from the office of Flower, Remy & Gregory.

Q. (By Mr. MANNING to Mr. Dewey—Graves' Rec., 719.) Did you ever have one word of conversation with Julius K. Graves in behalf of your firm, relative to the making of that assignment, before it was sent to you by Flower, Remy & Gregory? A. No, sir.

During the examination of Mr. L. J. Gage (Graves' Rec., 760–61), he produced the pretended assignment of judgment from Graves to Beveridge & Dewey, and also a pretended assignment, signed "Beveridge & Dewey, by David B. Dewey," of the same judgment to the First National Bank of Chicago, under date of February 20, 1883. Mr. Dewey was interrogated about this paper, when he testified as follows:

Q. (Graves' Rec., 720) I now show you a paper, purporting to be an assignment of a judgment from Beveridge & Dewey by David B. Dewey, to the First National Bank of Chicago, under a date which appears to have been changed, and the name of Julius K. Graves thereon appears to have been from some erased entry, and ask you if your signature is upon that paper? A. Yes, sir.

Q. Do you recollect the circumstance of putting it there? A. I do not.

Q. Do you know at whose request you put it there? A. I do not.

Q. Do you know where you were, when you put it there? A. I do not.

Q. Do you know to whom you delivered that paper, after so putting your name there? A I do not remember any circumstance about that paper.

Q. Neither as to the date nor as to the signature on it? A. I do not; I know that is my signature.

Q. Do you know whether the figures purporting to be the 20th of February show an erasure, and where the name Julius K. Graves is now written, were in the present condition at the time you signed the piece of paper? A. It is impossible for me, Mr. Manning, to state, as I do not remember the fact of signing it, or the circumstances under which I signed it.

Q. Were the following words written in the paper purporting to be an assignment by Beveridge & Dewey to the First National Bank, written in this paper at the time you signed it, to wit: "Which said judgment was afterwards by said Julius K. Graves duly sold and assigned to said parties of the first part for said sum," meaning the sum of $18,375 therein written? A. I have already stated to you, Mr. Manning, that I have no recollection of that paper; hence it is impossible for me to state what that piece of paper contained when I signed it.

Q. (Graves' Rec., 721-22.) Have you any knowledge as to whom or how the two assignments of judgments to which I have referred, were delivered to the First National Bank of Chicago? A. I cannot call to mind anything which will enable me to fix that date.

Q. When, for the first time, did you learn of the delivery of these two assignments to the First National Bank? A. I could not state.

Q. Did you ever have any dealings with L. J. Gage, of the First National Bank, whereby you procured the loan of money in behalf of Beveridge & Dewey, upon either of these two assignments of judgment, about which you have testified? A. I do not remember any talk of that kind.

Q. And you do not remember that any such arrangement was ever consummated, do you? A. I do not remember it.

Let us here call attention to what Mr. Gage says on the question of this pretended assignment of judgment by Beveridge & Dewey to the First National Bank:

C. Q. By Mr. Flower to L. J. Gage (Graves' Rec., 762). State whether or not the bank took the assignment of this judgment from Beveridge & Dewey as collateral to their account. State the consideration upon which the bank acquired the title to the judgment mentioned, if there was any consideration? A. The bank made cash advances, in the way of loans to Beveridge & Dewey, against the pledge of this judgment.

Q. By Mr. Manning to Mr. Gage (Graves' Rec., 763). Do you know when the paper purporting to assign the Graves judgment in the State court to Beveridge & Dewey was delivered to the First National Bank? I do not recollect the date.

Q. Do you know when the paper assigning, or pretending to assign, the Beveridge & Dewey judgment to the First National Bank, was delivered to the bank? A. They were assigned together, I do not remember the date.

Q. Who delivered these two last assignments, referred to by me, to the bank? A. I think it was Mr. Dewey, of Beveridge & Dewey.

Which of these two gentlemen—Mr. Gage or Mr. Dewey—told the truth, we are unable to ascertain. The next question here shown may throw some light on the matter of these pretended assignments.

Q. By Mr. Manning to Mr. Remy. (Graves' Rec., 830.) Were Flower Remy & Gregory the attorneys of Beveridge & Dewey during the years 1882 and 1883? A. I think we did some business for them in 1882, and we are doing some business for them now, 1883.

Mr. Remy further says (Graves' Rec., 824):

These three papers, purporting to be assignments of judgment, and marked Exhibits to the deposition of Gage, were prepared by a clerk in our office at my direction.

The preparation of these three pretended assignments of judgments by Remy at a time when he is attorney for Fay & Conkey—for J. K. Graves—for the First National Bank and for Beveridge & Dewey, we think sufficiently explains the mystery about the execution and delivery of these pretended assignments of judgments, and without anything else in the record, would convict Lyman J. Gage of conspiring with Julius K. Graves to defraud the limited partnership creditors.

Mr. Gage, in his testimony (Graves' Rec., 1,083) says: "On January 20, 1883, I had no doubt about the financial re-"sponsibility of J. K. Graves. His demand note would sell "at par in Chicago less exchange on Dubuque." And yet Mr. Gage, to shield Graves, allowed Remy to pretend to the limited partnership creditors that these confessed judgments in Graves' favor were in good faith assigned to the First National Bank. He (Gage) made no effort to collect the claims of the First National Bank against Graves as they matured, but held them all so that they were finally paid in full out of the assets of the limited partnership.

In regard to favors shown J. K. Graves by the First National Bank, Mr. Gage testified as follows (Graves' Rec., 1,085):

C. Q. (By Mr. Manning to Mr. Gage.) When the $5,000 note matured on which Graves was liable as guarantor, on the 22d of January, 1883, did you apply to him to pay that note? A. I think not.

C. Q. Did the First National Bank protest the note for non-payment? A. I think not.

C. Q. Why was it that the bank did not call upon Julius K. Graves to pay that note at its maturity? A. Because they were willing to keep it without calling on him.

C. Q. Did you call upon Julius K. Graves at any time as the paper

matured upon which he was liable to the bank, to pay it, or did the bank call upon him to pay it? A. I have no recollection that they did.

If anything more is required to convince the court that the assignment by J. K. Graves to L. J. Gage of the $28,350 judgment in the court below was fictitious, and made in bad faith, we call attention to the fact that on March 10, 1883, when Bradford Hancock, receiver, paid ninety per cent. of that judgment, he paid it directly to Julius K. Graves by his check which reads as follows:

No. 1. CHICAGO, March 10, 1883.

The First National Bank of Chicago, pay to the order of Julius K. Graves twenty-four thousand three hundred dollars (24,300.)

BRADFORD HANCOCK, *Receiver.*

If that large judgment had in good faith, on January 24, 1883, been assigned to L. J. Gage, cashier, why did not Bradford Hancock pay this $24,300 over to Mr. Gage and take his receipt for it instead of paying it to and taking a receipt from J. K. Graves as he did? (Bank Rec., 142.)

On March 26, 1883, Bradford Hancock paid J. K. Graves (not L. J. Gage) the balance due on this judgment, and gave him another check which reads as follows:

No. 6. CHICAGO, March 26, 1883.

The First National Bank of Chicago, pay to the order of Julius K. Graves twenty-nine hundred and thirty-two and 56/100 dollars ($2,932.56.)

BRADFORD HANCOCK, *Receiver.*

On making this payment Mr. Hancock took from J. K. Graves (not L. J. Gage) a receipt which reads as follows (Bank Rec., 143):

Received of Bradford Hancock, the receiver in the above entitled cause, pursuant to an order and decree of said court, the sum of two thousand nine hundred and thirty-two and 56/100 dollars in full of the balance due upon a judgment rendered in my favor against the defendants (Fay & Conkey) above named, on the 22d day of January, 1883.

Chicago, March 26, 1883. J. K. GRAVES.

In regard to the first Creditor's Bill and the judgment on which it was based, the court below found as follows:

"The court further finds (Graves' Rec., 156) that the said judgments, in favor of the Dubuque County Bank, the Commercial National Bank, and the Importers & Traders National Bank of New York, were confessed at the special instance of the said Graves; that the said judgment in favor of the said Commercial National Bank was not an indebtedness due from said limited partnership to said bank, and that said Graves owes to said limited partnership a sum equal to the assets of the said limited partnership which has been applied by his direction in payment of the three last named judgments; that the suit by creditor's bill in this court, wherein said Commercial National Bank, Julius K. Graves, the said Dubuque County Bank, and said Importers and Traders National Bank, were plaintiffs, and Benjamin B. Fay and Lucius W. Conkey were defendants, the said Bradford Hancock receiver, and with the funds in his hands as such, on and prior to March 26, 1883, paid on said last three named judgments as follows: To the said Commercial National Bank fourteen thousand three hundred and ninety-six dollars and 49/100 cents ($14,396.49). To the said Dubuque County Bank twelve thousand two dollars and thirty-eight cents ($12,002.38). To the said Importers and Traders National Bank fifteen thousand one hundred and twenty-six dollars and eighty-one cents ($15,126.81). And to the said Julius K. Graves upon het said judgment in his favor in this court, twenty-seven thousand two hundred and thirty-two dollars and fifty cents ($27,232.50). The court further finds that the two Creditor's Bills, above mentioned, brought in this court against Benjamin B. Fay and Lucius W. Conkey, in the first of which The Commercial National Bank of Dubuque and others were complainants, and in the second of which the Bay State Sugar Refining Company and others were complainants, were each brought and prosecuted with the intention of defrauding the creditors of the said limited partnership of their just rights; that the said Fay & Conkey consented to the filing of said bills and to the appointment of a receiver under the same."

We respectfully submit that these findings of the court below are fully warranted by the evidence, and that they should be affirmed in this court.

Samuel M. Griggs' Claim.

In December, 1885, Attorney J. Edwards Fay, a brother of Benjamin B. Fay, presented to the master (Bank Rec., 92)

for proof in this case a claim of $11,485.78 for one Samuel M. Griggs, and another for $3,500 in favor of Lydia B. Griggs; and Benjamin B. Fay volunteered his testimony as a witness to prove these claims. On cross-examination of Mr. Fay the fact came out that Lydia B. Griggs was his step-mother, and that Samuel M. Griggs was Mr. Fay's brother by marriage, and the amusing feature of this proceeding was the further fact that the claim of this Samuel M. Griggs was for eight of the Boies, Fay & Conkey notes that the firm put on the market for sale through Beveridge & Dewey, soon after Mr. Fay's return from New York, in the fall of 1882. It seems that Griggs bought these notes on the market, in Boston, without Fay's knowledge, and their dates cut quite an important figure in connection with the firm's pretended dissolutions of October 17th and 19th, 1882. The notes are all signed by Boies, Fay & Conkey, and payable to their own order, and endorsed by them. One dated October 14, 1882, (same day the first goods were pledged to Mr. Gage to secure the $10,000 demand loan at First National Bank) for $951.70 at four months. (Bank Rec., 93.) One dated October 16, 1882, for $1,546.15 at four months. One dated October 17, 1882, (the day of the first pretended dissolution of partnership) for $982.15, at four months. One dated October 18, 1882, for $1,643.08, at four months. One dated October 19, 1882, (the day the second and third pretended dissolution papers were signed), for $1,228.96, at four months. One dated October 20, 1882, for $1,047.22, at four months. One dated October 21, 1882, (the day Fay conveyed the firm's Humboldt Boulevard real estate to R. E. Graves), for $1,091.12, at ninety days. One dated October 28, 1882, for $1,324.08, at ninety days.

Benjamin B. Fay being shown the notes last referred to, says (Bank Rec., 95):

These notes were signed by me, but I didn't know where they were at the time of our failure. I learned from Mr. Griggs (Bank Rec., 109) that they bought this paper on the market, and wished to prove the claim so as they could come in.

Q. What did you tell them about proving it? A. I didn't object to their doing so.

Q. You volunteer here as a witness in proof of this claim? A. I am here as a witness.

Q. You came at the request of your brother, J. Edwards Fay, did you not? A. Yes, sir.

J. Edwards Fay was also sworn as a witness in support of the Samuel M. Griggs claim, and on cross-examination testified as follows (Bank Rec., 92, 93):

Q. You are a brother of the defendant, Benjamin B. Fay? A. I am.

Q. I call your attention now, Mr. Fay, to the answer filed by Benjamin B. Fay and Lucius W. Conkey in this Corbin suit—filed July 2, 1883—(shown in Graves' Rec., 66 to 70), and ask you if that is your signature at the bottom of that answer? A. It is, as solicitor.

Q. (Bank Rec., 93.) That is the same suit in which you now (seek) to prove up the claim, is it? A. I want to make an explanation in regard to this answer—this answer was prepared by Flower, Remy & Gregory, and was sent to my office, and I was requested to sign it as attorney for the defendants, Boies, Fay & Conkey, for the reason that I had entered an appearance in their behalf at the request of Flower, Remy & Gregory before that, in the case.

Q. The answer then, was drawn by Flower, Remy & Gregory? A. It was, as I recollect.

Q. And you signed it at their request? A. Yes, sir; it was sent over to my office by them.

Q. Have you ever, in this suit, withdrawn your appearance? A. I don't think I have formally.

In this connection, it may be well to notice that the answer of William A. Boies (shown Graves' Rec., 60 to 64), is signed "Wm. A. Boies, by F. Ullman, his solicitor."

Mr. Boies was examined and testified as follows (Graves' Rec., 275):

Q. Do you know Frederick Ullman? A. No, sir.

Q. Did you ever employ him as attorney in any manner in connection with this case? A. No, sir, I never have.

Q. (Graves' Rec., 270.) Who represents you now as one of the defendants in this suit? A. Flower, Remy & Gregory.

Q. And have they done so since the time of the August, 1882, inventory—acted as your attorneys? A. They have; what lawing I have had to do.

In view of the statement made by J. Edwards Fay, is it not more than probable that Flower, Remy & Gregory drew Mr. Boies' answer, and sent it over to Mr. Ullman with the request that he sign it, and that Mr. Ullman did so without ever being employed by Mr. Boies to represent him.

It appears by the record that not only B. B. Fay and J. Edwards Fay have come into this case to prove up claims, but Flower, Remy & Gregory also appear, as attorneys for certain claimants, in whose favor they had Fay & Conkey confess judgments on January 22, 1883.

At the time of the failure, Boies, Fay & Conkey were indebted to Sprague, Warner & Co. $1,776.64 for merchandise, and Flower, Remy & Gregory, being also Sprague, Warner & Co.'s attorneys, had Fay & Conkey confess a judgment in the court below in the name of one of their employes named D. C. Adams, [redacted].

In December, 1885, after the entry of the decree in this case in the court below, Sprague, Warner & Co. thought best to try and come in and prove up their claim before the master. Mr. Warner testified as follows (Bank Rec., 112):

Q. (By Mr. Manning.) You had a judgment confessed by Fay & Conkey in D. C. Adams' name for the amount due your firm, did you not? A. Yes, sir, through Flower, Remy & Gregory our attorneys at that time.

Q. (Bank Rec., 114.) They are still acting as your attorneys? A. They are in many cases.

Q. How recently have you conferred with any member of the firm (of Flower, Remy & Gregory) about this case, and the proving of this claim? A. I had an interview with them, I should say it was Thursday, but it may have been Wednesday of this week with reference to making this proof.

Q. Which member of the firm did you see? A. Mr. Flower—and he recommended us to prove up it.

Q. And in accordance with that direction, you are here, are you not? A. Yes, sir.

Q. (Bank Rec., 115.) Have you ever paid any portion of the expenses for the prosecution of this suit? A. Not to my knowledge.

Q. Do you now offer to pay such share of the costs and expenses as have been incurred up to this time in the prosecution of this suit? A. We make no offer.

Q. (Bank Rec., 116.) Are you willing to pay such a sum as would be your share of the expense necessary to take this case to the United States Supreme court? A. I am not prepared to answer.

Towle, Carle & Co. also came before the master in Novemver, 1885, to prove up a claim. Mr. Towle testified as follows (Bank Rec., 88):

Who are your attorneys in presenting this claim before the master? A. Flower, Remy & Gregory.

Q. Have they been your attorneys since December, 1882? A. Yes, sir.

Several of the confessed judgments have as heretofore shown, been practically disposed of. The testimony shows conclusively that the judgment confessed in favor of John H. Lull was wholly fictitious.

George E. Johnson, Mary Murison and the Necedah Lumber Company, repudiated the confessed judgments in their favor and have come into this case as intervening petitioners and their claims have been approved by the master.

D. C. Adams, another of the defendants had no valid claim and Sprague, Warner & Co., who say that the judgment confessed in D. C. Adams name was for their claim, now also come in (Bank Rec., 112), under the advice of Mr. Flower and prove their claim before the master, and abandon their judgment in D. C. Adams' name.

The Merchants National Bank of Middletown, Ohio, in whose favor Fay and Conkey confessed a judgment, another

of the defendants in the original bill consents. (Graves' Rec., 1,100), that its judgment may be set aside and held for naught.

The judgment of J. L. Dobbins, in whose favor Fay and Conkey at the request of Mr. Remy, confessed a judgment, (Graves' Rec. 557), under the pretense that such judgment would secure the firms debt to their teamster Olin, is also a fraudulent transaction and Mr. Olin has proved and had allowed by the master his claim against the limited partnership.

In filing the answer in this case for Necedah Lumber Company, Merchants National Bank of Ohio, J. L. Dobbins and D. C. Adams as Flower, Remy & Gregory did, without authority, (Graves' Rec., 71), they say for these four defendants: "That they admit the organization of the limited partnership, "set forth in said bill and that it was subsequently dissolved. "These defendants further answering say, they claim nothing "as against the estate of Boies, Fay & Conkey * * * "except the right to hold said judgments as a personal claim "against Fay and Conkey." * * *

How very willing Flower, Remy & Gregory are, to multiply judgments against Fay and Conkey, and how carefully they guard, and seek to prevent the entry of any against the limited partnership, but when detected in their scheme, how readily they advise Sprague, Warner & Co. to follow in the wake of Necedah Lumber Company and Ed. Olin to prove up their claims against the limited partnership, and abandon their Fay and Conkey judgments.

Referring again to the pretended dissolution and the notice to creditors of such dissolution, we desire to call the attention of the court to the only notice that was issued by the firm which in any way relates to the dissolution, and that was a postal card, with the following notice printed on the back of it. This card was issued some time between December 2, 1882,

and January 20, 1883, and dated back to December 2, 1882, and reads as follows (Graves' Rec., 544):

CHICAGO, December 2, 1882.

GENTLEMEN: The wholesale grocery house of Boies, Fay & Conkey being dissolved by mutual consent, the undersigned will continue the business at the same location. Our store is one of the most accessible in the city, being in close proximity to the leading hotels and in the midst of the largest commission houses. We have increased our facilities in very many respects, and know that we are now in every way prepared to fill all orders in a satisfactory manner. We guarantee that no house in Chicago can ship and bill more promptly, or will labor more diligently to merit the patronage which we are now soliciting from you. We are deeply indebted to the many friends who dealt so liberally with Boies, Fay & Conkey during the past ten years, and sincerely hope they will extend the same feeling of friendship to the new firm.

Truly yours,

FAY & CONKEY.

Mr. Vaughan testified as follows:

C. Q. By Mr. Flower. (Gray Rec., 438.) Your attention has been called to a postal card which was published under your direction, announcing the dissolution of the firm and the fact that Fay & Conkey had succeeded to the business. Was that postal card sent to creditors as well as customers of the firm? A. I do not think it was.

C. Q. Did you get out anything else announcing a dissolution, or publish any letter-heads in connection with that succession? A. We had letter-heads afterwards.

C. Q. At or about the time the postal card was sent out? A. As soon after as the old heads were used up.

The defendants having up to nearly the expiration of the time for closing their proofs failed to show any notice to creditors of the several pretended dissolution notices, conceived the idea of showing that in their correspondence a Fay and Conkey letter-head had been used by the firm. We will now show from the record what their success was in establishing such proof.

Fay and Conkey note or letter-heads.

While at Dubuque taking the deposition of Julius K. Graves he was notified to produce all the letters received by him from Mr. Fay or from Fay & Conkey during December, 1882, or January, 1883, and in response to such notice J. K. Graves produced *three* letters, one written December 2, 1882, (heretofore shown) written on a Boies, Fay & Conkey letter-head; one dated December 10, 1883 (Graves' Rec., 1,069) on a Fay & Conkey letter-head, and one dated January 9, 1883, (Graves' Rec., 1,067,) also on a Fay & Conkey letter-head.

As the complainant's solicitor did not see fit to put these letters in evidence Mr. Flower interrogated J. K. Graves as follows:

Letters of Fay to Graves on Fay and Conkey letter-heads.

Q. (Mr. Flower to J. K. Graves—Graves' Rec., 1066.) Have you produced here, Mr. Graves, at the request of the complainant's counsel, all the December and January letters of Fay and Fay & Conkey, which you have been able to find—December, 1882, and January, 1883? A. I have produced all the letters of those dates which I can now put my hands on; they are here.

Q. Have they been exhibited to complainant's counsel? A. They have.

Q. By Mr. Flower (Graves' Rec., 1069.): Mr. Graves, your attention has been called to a letter produced here under date of December 10. State by whom that is written and signed? A. By Mr. Fay.

Q. When was that letter received by you? A. December 11, 1882. I notice the date is 1883. Its a mistake. It should be 1882.

(Mr. Flower offered above letter in evidence marked Exhibit "16."

J. K. Graves' "Letter-Head" Fraud Disclosed.

On examination of this last letter put in evidence by Mr. Flower as Exhibit "16," it was found that the heading, Fay & Conkey, Wholesale Grocers and Importers, was lithographed by the Schober & Carqueville Lithographing Com-

pany, and very soon thereafter the deposition of F. B. Schuchardt, the superintendent of said lithographing company, was taken, when he testified as follows (Graves' Rec., 1235):

Q. (By Mr. Manning): Did the Schober & Carqueville Lithographing Company do any work for Boies, Fay & Conkey, or Fay & Conkey during December, 1882, or January, 1883? A. Yes, sir.

Q. What was it? A. We made for them 5,000 note-heads and 2,000 business cards.

Q. For which firm did you make these note-heads or letter-heads? A. For Fay & Conkey.

Q. When did you receive the order to do that work? A. We received the order on the 12th of December, 1882.

Q. How long a time did it take to do that work, and when were the first of the note-heads so lithographed by you delivered to Fay & Conkey? A. We delivered the first and all of them on the 15th of January, 1883.

Q. Were any delivered before that time? A. No, sir.

Q. Is the note-head I now show you, and which is Exhibit "16" to Graves' deposition in this case, the note-head which the Schober & Carqueville Lithograph Company made for Fay & Conkey? A. Yes, sir; that is the one we made.

Q. Prior to the 15th of January, 1883, did Fay & Conkey have the letter-head on which the letter you now hold in your hand—Exhibit "16" to Graves' deposition, dated the 10th of December, 1883—was written? A. No, sir.

Q. (Graves' Rec., 1236.) I now show you another letter, which is Exhibit "15" to Graves' deposition, on the same letter-head or note-head, and dated January 9, 1883, and ask you when that letter-head was first delivered to Fay & Conkey? A. That was delivered the 15th day of January, 1883.

Well might Julius K. Graves say at this date to his brother-in-law, "Ben, our scheme has not worked so well since Jan-"uary 22, 1883, as it did for a few months prior to that date," and is it not likely that Fay replied, "I was afraid Julius, when "you asked me to write those letters to you on those new Fay "& Conkey letter-heads, and date them in December, that you "would get caught, for you know we did not get any of them "until January 15, 1883."

Bad as Fay was, he evidently hesitated about dating either of the letters at any time in December, but he finally made it

read *December 10, 1883*, leaving it for Julius K. Graves, the head and front of this fraudulent conspiracy, to swear, as he did (Graves' Rec., 1069), that he, Graves, received that letter written by B. B. Fay on the Fay & Conkey lithographed letter-head, and dated December 10, 1883. *on December 11, 1882.*

We have heretofore shown that Julius K. Graves by his actings and doings in this case stands charged with fraud, with larceny as bailee, with forgery, and now we think perjury may justly be charged against him.

J. K. Graves in Contempt of Court.

Truly the way of the transgressor is hard.

With such a record as we have shown against Julius K. Graves, is it at all remarkable that he has been found guilty of contempt by the court below and that a warrant for his arrest is in the hands of the marshal for the Northern district of Illinois.

The court below ordered Graves, *First*, to personally appear before the court on a certain day, at a certain hour—a copy of this order was personally served on Mr. Graves four days before he was required to attend (Bank Rec., 49). This order was wilfully disobeyed and wholly ignored, and no reason or excuse was given to the court by Graves or his counsel why he did not attend. *Second*, to show cause, if any there be, why he should not be attached as for contempt, in failing to pay to the clerk of this court the sum of one hundred thousand seven hundred and ninety-six dollars and seventy-one cents ($100,796.71), as he was ordered to do by the dercee entered herein on November 17, 1885.

Is there anything unreasonable in either of these requirements?

The suit in which these orders were entered was in the city where Graves was engaged in business with Boies, Fay & Conkey. He was personally served with summons in the pending suit; he had filed his answer in the case and personally attended in court during the long trial with able counsel, and vigorously defended the suit, and when it is finally decided against him he quietly crosses the Mississippi river and there defies the authority of the court before whom the suit was pending.

With reference to Graves' refusal to personally appear in obedience to the court's direction, the court below says (Bank Rec., 66):

"Graves should have paid into court the amount adjudged to be due from him, if he was able to do so, and if he was insolvent or unable to satisfy the decree he could and should have exonerated himself by personally appearing and showing that fact. It cannot be that the law is so impotent as to allow a party to resist a suit, step by step, and when a decree is entered against him disobey it with impunity, by removing beyond the courts territorial jurisdiction."

We think this view of the law and this reasoning of the court below should be approved in this court, and thus have the law of the United States settled on this point. If a defendant can commit glaring frauds in one court's jurisdiction and by so doing accumulate large sums of money and then, when sued and found guilty defeat a recovery by simply going into another court's jurisdiction, the law is indeed impotent. In *Wartman* v. *Wartman*, Campbell's Report, 262, Chief Justice TANEY says:

"Disobedience to the legitimate authority of the court is by law a contempt unless the party can show sufficient cause to excuse him."

In the case at bar, it certainly was within the legitimate authority of the court below, to order Julius K. Graves to *personally* appear in that court on a day and hour named in the writ, and when once in court to tell the judge why he had not paid

over the money to the clerk of the court as he was directed to do in one of the court's former orders.

Items Making up Decree against J. K. Graves.

It may be well at this point to show the several sums making up this decree of $100,796.71 against Mr. Graves. They are as follows:

The two checks of Bradford Hancock, delivered to J. K. Graves, payable to the Commercial National Bank of Dubuque, amounting to	$ 14,396 49
The two checks of Bradford Hancock, delivered to J. K. Graves, payable to the Dubuque County Bank of Dubuque, amounting to	12,002 38
The two checks of Bradford Hancock, delivered to J. K. Graves, payable to the Importers and Traders National Bank, amounting to	15,126 81
The two checks of Bradford Hancock, delivered to and payable to J. K. Graves, amounting to	27,232 56
Six per cent. interest on these four amounts from March 26, 1883, to October 27, 1885	10,668 99
The several sums wrongfully received by J. K. Graves on Sunday, January 21, and on Monday, January 22, 1883, from the firm's remittances	2,741 38
Amount received under his unlawful partnership agreement for $10,000 per annum	5,900 00
Amount received on the execution issued on the judgment confessed in favor of J. K. Graves in State court	9,791 18
Six per cent. interest on three last-named amounts from March 1, 1883, to October 27, 1885	2,936 92
Total	$100,796 71

We will say in explanation of the interest being figured up to October 27, 1885, that on this day the decree was presented to the court with the interest calculated until then, but that the decree was not entered until November 17, 1885.

Attorney's Fees Included in the Confessed Judgments.

We have already shown, and the court below has found, that on or about January 22, 1883, twenty-two judgments were confessed by Benjamin B. Fay and Lucius W. Conkey, seven in the State court, and fifteen in the United States Circuit court, the judgments amounting to $233,709.09, of which $10,658.65 represented attorney's fees.

On the question of these attorney's fees, the depositions of three of the leading attorneys of the Chicago bar, were taken. A. M. Pence testified as follows (Graves' Rec., 780):

"I have been a lawyer in Chicago twenty-one years.

Q. Suppose Mr. Pence, on the 22nd of January, 1883, you were, and for some time prior thereto had been the attorney for the wholesale grocery firm of Boies, Fay & Company, or Fay & Conkey, and that on that day, they came to you, as their attorney and told you they must fail in business, and they desired you for them, to enter up twenty-two judgments by confession—seven in the Superior court of Cook county, and fifteen in the United States Circuit court for the Northern district of Illinois at Chicago—aggregating about two hundred thousand dollars, and they desired the judgments entered to parties, whom they desired to prefer over other creditors, what in your judgment would be a fair value for the legal services in entering up these twenty-two judgments by confession?

A. Well, to answer simply the plain question as you put it, I should think that $300 to $500, would be a very liberal fee.

To a similar question propounded to Wm. C. Grant (Graves' Rec., 783,) he answerded, page 784:

"My judgment would be that $500 would be a round fee for the work and responsibility in entering such judgments."

To a similar question propounded to Hon. Melville W. Fuller, now Chief Justice of this court, he replied, (Graves' Rec., 790):

"I should think that it would be worth two thousand dollars to enter up twenty-two judgments, involving the amount stated."

In the case at bar we claim, and insist, that the signing of

the several pretended dissolution notices, the witholding their publication, the publication of one kind of notice in the Legal News, and another kind in the Evening Journal, the failure to notify any creditor that Julius K. Graves had withdrawn from the firm, the buying and selling goods in the limited partnership name, up to the day of the failure, the using the two firm names at the First National Bank, and the signing of the $40,000 judgment note in favor of the bank, and twenty-one other judgment notes in favor of others should be deemed in law one fraudulent transaction.

Under the facts and circumstances shown to exist in this case, we think it is safe to say that on October 17, 18 and 19, 1882, when Boies, Fay, Conkey, Graves and Remy were attempting to devise some plan or scheme for a secret dissolution of this limited partnership, they all knew that the firm was then insolvent. They may not have known the extent, or the utter hopelessness of the firm's affairs, as disclosed later, but they knew [redacted] enough for them to understand at the time Remy drew, and Boies, Fay, Conkey and Graves signed the pretended dissolution papers, that the firm could not continue in business after the maturity of the bills, purchased on the credit of the limited partnership, during September, October and November, 1882, and we further claim and insist that the testimony *warrants the conclusion* that on October 19, 1882, when Mr. Remy drew the dissolution paper, providing for a continuation of the business, and for contracting more indebtedness in the name of Boies, Fay & Conkey, that the appellant the First National Bank of Chicago knew of the signing of the various secret dissolution papers by Boies, Fay, Conkey and Graves during October, 1882, and of the firm's insolvency at that time.

One of the witnesses in this case, Mr. Hanford, said in substance (Graves' Rec., 613):

"When J. K. Graves went into the firm of Boies, Fay & Conkey, his going in was largely advertised but we never heard of his going out until the time of the failure."

Can it be possible that under the limited partnership law of Illinois a firm can be organized with sufficient capital so as to have an excellent credit in every city in the United States, a credit so good that its firm notes will sell in New York and Boston at the rate of eight per cent. per annum discount, and with such credit incur hundreds of thousands of dollars of indebtedness and then before the maturity of such indebtedness turn over to their special partner, all the firm assets and make no provision whatever for the payment of the indebtedness so incurred? Will the courts favor the formation of limited partnership for a term of five years and then approve of their dissolution within six months?

Mr. Conkey when asked why the limited partnership being formed for five years was discontinued or attempted to be discontinued in five or six months, answered (Graves' Rec., 923): "I do not know what the reason was. Mr. Graves wanted to go out."

Julius K. Graves testified in regard to his desire, *to go out* (using Mr. Conkey's expression), as follows (Graves' Rec., 1065):

C. Q. (By Mr. Manning) You have testified Mr. Graves, that one of the reasons why you wished to withdraw, was on account of the business enterprises in which you were engaged in Iowa. Was there any new enterprise you went into between the first of April, 1882, and October, 1882, or did they remain about the same? A. I did branching out. I might have been engaged in enterprises on the first of April which were very largely increased between that time and October.

C. Q. Does any new enterprise occur to you that you engaged in during that time—that is of any particular magnitude? A. I think one, that I recall, in which I was already somewhat interested, was very largely increased, within the period named.

C. Q. Which was that? A. That is the Iowa Iron Works. I think, also,

I had agreed within that period to furnish a very large amount of money to be used in the construction of a railroad.

C. Q. At the time you went into the railroad enterprise, you knew that you had just formed a partnership for five years with Boies, Fay & Conkey, did you not? A. I knew that I had formed a partnership with Boies, Fay & Conkey. I believe it was for five years.

May not this, after all, fully explain the situation. Is it not probable that the entire assets of the limited partnership of Boies, Fay & Conkey, were dumped by Julius K. Graves into his railroad scheme. He went out, or, as Conkey says, he wanted to "go out," at a time when he had agreed "to furn-"ish a very large amount of money to build a railroad."

May it not be that this "railroad builder" temporarily used some of the warehouse receipts issued in the fall of 1882, for Boies, Fay & Conkey merchandise, to raise money on, to build his railroad, and that he (Graves), forgot to replace them, or to account therefor to the Boies, Fay & Conkey creditors. If he *did* use them, this may account for some of the fifty thousand cases of goods which Mr. Olin says his teams hauled direct from the freight depots to the warehouses. Mr. Olin says (Graves' Rec., 544):

"Out of these 50,000 cases, some lines we never did touch at all."

Mr. Olin further says (Graves' Rec., 565), along in the fall (of 1882), "there was very queer transactions." May it not be that the sudden disappearance of the warehouse receipts, which he (Olin), obtained for the firm, was one of the queer transactions the witness referred to—possibly Mr. Olin got an inkling about that time that J. K. Graves was a little short of funds to build his railroad.

On the Question of Jurisdiction.

The appellant's brief was not received by appellee's counsel until November 23, 1889—greatly to his surprise the appellant

raised the question of the jurisdiction of the court below. On April 4, 1883, when the appellant, the First National Bank of Chicago, filed its petition for removal of the cause in the State court, the appellee, being then proceeding with taking testimony in the case, opposed the application for removal before the court below, and then raised the question of jurisdiction in opposition to such removal, on the ground that four of the defendants and the complainant were citizens of Massachusetts. After full argument by Mr. Flower in behalf of the bank, and by Mr. Manning in behalf of complainant, his Honor, Judge Drummond, rendered the following opinion, which is reported in 18 Fed. Rep., 3, and is as follows:

"DRUMMOND, J. Boies, Fay & Conkey were wholesale grocers, engaged in business in Chicago, and Julius K. Graves became a special partner under the law of this state, in the sum of $50,000 contributed to the capital of the firm. The firm was unsuccessful and became insolvent, and the plaintiff, a citizen of Massachusetts and creditor of the firm, filed a bill in the State court alleging that various provisions of the laws relating to special partnerships had been violated by the firm; among other things, charging that judgments in favor of various individuals and corporations were confessed for more than was due, upon which executions had been issued, and the property of the firm taken. The First National Bank of Chicago, the bill alleged, had obtained a judgment on which execution had been issued, by a wrongful preference given by the firm. The bill also alleged that preference was given in favor of citizens of Massachusetts. The First National Bank of Chicago filed a petition in the State court, and gave a bond praying for the removal of the cause to this court under the act of 1875, alleging that there was a controversy which was wholly between the plaintiff and the First National Bank which could be fully determined as between them. The parties now come before the court, and the plaintiff raises the question whether the case was removable under the statute. There was no issue formed in the State court, and therefore the question must be decided upon the bill and the petition of the First National Bank, and it seems to me there can be no doubt but that there is a controversy which is wholly between the plaintiff and the bank; that is to say, whether the judgment was a valid judgment as against the firm, and the plaintiff as one of its creditors. The bank is not interested in any controversy which the plaintiff may have with other judgment creditors of the firm. Its position is that the judgment in favor of the bank is valid, irrespective of what may be true of any other claim or judgment.

"It is objected that there are other defendants who are citizens of the same state with the plaintiff, and if the court takes jurisdiction of the case and of the various controversies which arise, it must decide controversies between citizens of the same state. That may be true, but the Supreme court of the United States has decided, in *Barney* v. *Latham*, 103 U. S., 205, that in a case like this the application for removal takes with it to the Federal court the whole case, and therefore the controversies between the plaintiff and citizens of Massachusetts, who are defendants with others, must also come into this court. This being in the nature of a creditor's bill, which charges illegal and fraudulent acts affecting the rights of the plaintiff against different individuals of different states and different corporations, it can hardly, therefore, be considered a case where the different controversies are so far separated as that one can be removed without the other. In *Barney* v. *Latham* one of the objections taken to the removal of the case was that the Winona and St. Peter Land Company, one of the defendants, was a corporation of Minnesota, of which state one of the plaintiffs was a citizen; and the court held, notwithstanding that fact, the cause was removable, at the same time stating that to the other controversies in the case, independent of the one which authorized the removal, the land company was not an indispensable party, although it might be a proper party. That is true in this case. The citizens of Massachusetts who are made defendants may be proper parties, but they are not indispensable parties to the controversy between the plaintiff and the First National Bank of Chicago. The bill might have been filed by the plaintiff against the members of the firm and the bank, without making the other defendants parties. And then the defendants, citizens of Massachusetts, have not been served with process, and never may personally appear in the case. The only question there can be, therefore, in this case, is whether Congress had the power to authorize the removal of a cause, where there was one controversy between citizens of different states and another between the plaintiff and some defendants who were citizens of the same state with him. No question seems ever to have been made by the courts as to the right of Congress to pass such a law, and, therefore, I think the court will order the transcript to be filed and the case to be docketed in this court."

To the same effect are the following decisions:

Langdon v. *Fogg*, 18 Fed. Rep., 5.
Kerling v. *Cotzhausen*, 16 Fed. Rep., 705.
Sheldon v. *Keokuk Northern Line Packet Co.*, 9 Biss., 307.

Barney vs Latham 103 U.S. 205
Des Moines Navigation & R.R. Co vs Iowa Homestead Co 123 U.S. 552

In the fifth edition of Dillon on Removal of Causes, Sec. 41, this writer says:

It is now the settled doctrine of the United States that when a separable controversy is removed, the *whole suit* is carried with it, and no part is left to the determination of the State court.

A defendant at whose instance a suit has been removed into the Circuit court under the Judiciary act of 1789, Sec. 12, cannot move to dismiss the suit for want of jurisdiction.

Bushnell v. *Kennedy*, 9 Wall., 387.
Edwards v. *Connecticut Mutual Life Ins. Co.*, 20 Fed. Rep., 452.

The appellant's counsel (Mr. Flower), when before Judge Drummond, argued that the confessed judgment in favor of the bank was valid, irrespective of what might be true of some of the other judgments; that while the Massachusetts defendants might be proper parties, they were not indispensable parties, to the controversy between the complainant Corbin and the bank. Mr. Flower then citing and relying upon the opinion rendered by Mr. Justice Harlan, 103 U. S., 205. We fail to find this case cited by Mr. Flower in his brief in this court.

After this opinion was rendered in which the court held the bank's petition for removal carried the whole case to the court below, the following order was on April 11, 1883, obtained by Flower, Remy & Gregory (Graves' Rec., 36):

Chester C. Corbin
vs.
Wm. A. Boies *et al.* } *In Chancery.*

Upon motion of Flower, Remy & Gregory, solicitors for certain defendants, leave is hereby given them to file an additional transcript of record from the Circuit court of Cook county.

On April 6, 1883, at the conclusion of the deposition of J. H. Burke (Graves' Rec., 815) the following entry appears:

Counsel for complainant here states that he has been before his Honor Judge Drummond in the United States Circuit court for the Northern district of Illinois, and said judge having taken jurisdiction of said cause, under petition for removal by the First National Bank of Chicago, the further taking of depositions under notices in said cause is here suspended.

On April 24, 1883, the following stipulation was signed and filed in said cause (Bank Rec., 145):

IN THE CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS.

Chester C. Corbin
vs.
Wm. A. Boies *et al.*

The motion for temporary injunction, restraining Bradford Hancock, one of the defendants herein, from paying over any money as receiver under certain creditor's bills in this court, wherein Benjamin B. Fay and Lucius W. Conkey are defendants, coming on to be heard, and by consent of counsel for said receiver and counsel for the complainant herein, respectively and in lieu of such writ of injunction, it is agreed by Flower, Remy & Gregory, solicitors for said receiver, Hancock, that no further payments of money now in the hands of said receiver, or that may be collected hereafter by said Hancock, as such receiver, shall be paid over to the complainants in said creditor's bills or either of them or to any attorneys or agent of said complainants until further order of this court, except that said receiver shall pay such costs and expenses as may be necessarily incurred in the care and custody of the property in his possession as such receiver and in the collection of the claims, demands, and choses in action transferred by him as such receiver.

April 24, 1883.

FLOWER, REMY & GREGORY,
Solicitors for Hancock, Receiver.
WILLIAM J. MANNING,
Solicitor for Chester C. Corbin, Complainant.

On May 22, 1883, Flower, Remy & Gregory voluntarily entered in the court below (Graves' Rec., 50,) the appearance of The Bay State Sugar Refining Company, The First National Bank of Westboro, Alvin F. Shumway and Walter Potter.

On July 2, 1883, Flower, Remy & Gregory voluntarily filed

in the court below an answer for The Bay State Sugar Refining Company, The First National Bank of Westboro, Alvin F. Shumway, and Walter Potter, (Graves, Rec., 81–2), in which answer they admit the organization of the limited partnership as set forth in complainant's bill, admit the confessions of judgment by Fay & Conkey in their favor on January 22, 1883, that executions were issued thereon and returned unsatisfied, and further admit that they filed what is called the second creditor's bill thereon, under which bill they received from Bradford Hancock, receiver, twenty per cent. of the amount of their respective judgments.

On October 17, 1883, Mr. Flower entered (Graves' Rec. 688), the following consent:

"Mr. Flower, counsel for defendants, (all of them) consents that the deposition of John J. Duffy and James H. Burke, taken before Charles L. Driesslein, as notary public, may be used in evidence on the trial of this suit to the same extent and in like manner as though taken before said Driesslein as examiner, appointed by the court in this suit, and the cross-examination of both said witnesses is waived.

On January 15, 1884, the following stipulation was entered in this cause by Mr. Manning in behalf of the complainant Corbin, and Mr. Flower, in behalf of all the defendants. (Graves' Rec., 797.)

It is hereby stipulated and agreed by and between the solicitors for the complainant and for the defendants—

That all the judgment notes mentioned and described in the complainant's bill were executed by Fay & Conkey.

That judgments were entered thereon and executions issued for the amount stated in said bill and delivered to the proper officers for service and collection.

That creditors' bills were filed on certain of said judgments recovered in the Circuit court of the United States as mentioned in said bill, and Bradford Hancock appointed receiver thereunder.

That parties complainant and defendant herein may use upon the final hearing of this cause, any or all of the processes, pleadings, and proceedings including executions and all returns thereof in any of the actions and suits re-

ferred to in the complainant's bill in like manner and to the same extent as though the same had been duly produced, offered, and received in evidence by and before the examiner appointed to take testimony herein.

It is further stipulated and agreed that the books of account of Boies, Fay & Conkey referred to and identified in the testimony taken by the complainant in said cause may be used on the trial before the court with a right to either party to put in evidence such entries in said books as they see fit, subject to all objections as to their admissibility for any purpose against all the parties defendant in this suit except Boies, Fay & Conkey.

Robert E. Jenkins Appointed Receiver.

On January 26, 1884, the following order was entered in said cause by Judge Drummond (Graves' Rec., 102):

Corbin v. *Boies et al.*

The motion for the appointment for a receiver in this cause having come on to be heard, and the solicitors for the respective parties having been heard, hereon, now, on motion of William J. Manning, solicitor for the complainant, it is ordered by the court that Robert E. Jenkins, be, and he is hereby, appointed receiver of the property, equitable interests, things in action, and effects of the defendants, William A. Boies, Benjamin B. Fay, Lucius W. Conkey, and Julius K. Graves as co-partners under the name and style of Boies, Fay & Conkey, or Fay & Conkey, belonging to said firms, or either of them or in any way appertaining thereto at the time of the commencment of this action, to wit: on the 1st day of March, A. D. 1883, and vested with all the rights and powers of a receiver in chancery according to law and the rules and practice of this court, upon his filing with the clerk of this court a bond for the faithful performance of his duties as such receiver in the penal sum of ten thousand dollars (10,000) and the approval thereof by this court, and it is further ordered that the said William A. Boies, Benjamin B. Fay, Lucius W. Conkey and Julius K. Graves, appear before Charles L. Driesslein, United States commissioner and special examiner, heretofore appointed by this court to take the testimony in said cause at such time or times and place as he may designate and execute and deliver to said receiver an assignment assigning, transferring, and conveying to him all their aforesaid property, equitable interests, things in action and effects, and that Bradford Hancock, one of the defendants herein, show cause on Tuesday morning next why he should not deliver to said receiver all books, papers, and vouchers

now in his possession relating thereto, and all moneys in his hands as receiver of said Fay & Conkey.

And the said complainant or the said receiver shall be at liberty to apply to the court from time to time for such further order or direction as may be necessary.

Order Entered by Consent of Flower, Remy & Gregory, Solicitors for Defendants.

On February 19, 1884, the following order was entered by Judge Drummond (Graves' Rec., 106).

The motion of the complainant, by William J. Manning his solicitor, heretofore made in said case in reference to Bradford Hancock as the receiver of this court under creditors bills against the defendants Benjamin B. Fay and Lucius W. Conkey, delivering over the books of account, notes and assets in his hands as such receiver to Robert E. Jenkins, receiver in this cause, coming on to be heard, and said motion having been fully argued by counsel for the respective parties and duly considered by the court; and, whereas, it appears that on or about January 23, 1883, a creditors' bill was filed in this court by certain of the defendants herein, to wit: The Commercial National Bank of Dubuque, Iowa, and Dubuque County Bank, Dubuque, Iowa, Julius K. Graves and the Importers and Traders National Bank of New York, against the defendants, Benjamin B. Fay and Lucius W. Conkey; and it further appearing that on or about January 26, 1883, a second creditors' bill was filed in this court by certain other of the defendants herein, to wit: The Bay State Sugar Refining Company, Martha J. Fay, the First National Bank of Westborough, Addison B. Robinson, Hiram A. Sheldon, Alvin F. Shumway and Walter Potter, against the said defendants, Benjamin B. Fay and Lucius W. Conkey under which creditor's bills an order was entered in each case by this court appointing said Bradford Hancock, receiver therein, upon his filing bonds in said suits to be approved by this court, and it appearing that in said second creditors' bill no bond of said Hancock as such receiver is now on file with the clerk of this court, and it further appearing that all the parties complainant in said two creditors' bills are parties defendant in this cause, and it further appearing that the complainant herein and other creditors of the limited partnership of Bo ies, Fay & Conkey claim to have an interest in all the funds heretofore realized by said Hancock as such receiver, and it appearing that no report has ever been filed by said Hancock, as receiver, under either of said creditors' bills—

It is therefore ordered by the court that said Bradford Hancock, on or before February twenty-third, 1884, file in this court his bond, to be approved

by the court, in the penal sum of fifty thousand dollars ($50,000), in the said second creditors' bill as indemnity to whomsoever it may concern.

And it is further ordered that said Hancock, his solicitors having consented thereto, deliver to said Jenkins, on his application therefor, after March second, 1884, all the books of account, notes, drafts, acceptances, or other evidences of indebtedness due to either Boies, Fay & Conkey, or Fay & Conkey, and all office furniture or fixtures which have come into his possession as such receiver, and that said Jenkins from and after February sixteenth, 1884, have sole authority to collect all outstanding indebtedness now due to either Boies, Fay & Conkey, or Fay & Conkey, which was not on said February sixteenth, 1884, in process of collection by suits before then commenced by said Hancock or by pleas of interpleader before then filed by him.

That from and after the entry of this decree for the purposes of pending litigation, said Hancock and his attorneys may have full access to said books of account.

And it is further ordered that said Bradford Hancock, on or before the second day of March, A. D. 1884, file in the said the Commercial National Bank of Dubuque *et al.* against Benjamin B. Fay *et al.* case, and in the said the Bay State Sugar Refining Company *et al.* against Benjamin B. Fay *et al.* case, a full and complete report, showing his receipts and disbursements and the consideration for each disbursement made by him, and the exact amount of money now in his hands or in the hands of his attorneys as receiver, under the two creditors' bills hereinbefore mentioned.

And it is further ordered that the complainants' solicitors herein may, on leave of the court first had and obtained, file objections to the reports of said Hancock if they so desire, and no order approving the reports of said Hancock shall be entered until the further order of this court.

By the foregoing orders and stipulations it will be seen that Flower, Remy & Gregory, on their own motion, brought the whole Boies, Fay & Conkey controversy from the State court into the court below, and after so removing said cause, they voluntarily entered the appearance of every one of the defendants, except the two Dubuque banks and the New York bank. Having so brought the case into the court below, we respectfully submit that neither Julius K. Graves nor the First National Bank should now be permitted to raise the question of jurisdiction in this court.

In regard to the four Massachusetts defendants, the court

below would not have obtained jurisdiction over them if Flower, Remy & Gregory had not seen fit to enter their appearance. They voluntarily came into the court below, with the other defendants in the second creditor's bill, and said they had received twenty per cent. on their claims, and that they had paid to Flower, Remy & Gregory the five per cent. attorney's fees mentioned in the notes in their favor.

Flower, Remy & Gregory have settled the decree against them for the attorney's fees so received, and all the complainants in the second creditor's bill by an agreement entered into between Flower, Remy & Gregory in their behalf, and Mr. Manning, in behalf of the complainant, and the intervening creditors, have accepted and been allowed to retain the twenty per cent. so received by them, and in consideration of being allowed to retain that amount they have released any and all claims they may or might have against any funds realized in this suit. We here insert a copy of the order entered in the court below in so far as it relates to such settlement.

Corbin *vs.* Boies *et al.*
Order June 13, 1888.

And now comes the complainant and other creditors of the limited partnership of Boies, Fay & Conkey by William J. Manning, their solicitor, and the defendants by Flower, Remy & Gregory, their solicitors and by agreement of counsel * * * it is ordered that the following named defendants, to wit: The Bay State Sugar Refining Company, the First National Bank of Westborough, Massachusetts, Alvin F. Shumway, Martha J. Fay, Hiram A. Sheldon, Addison B. Robinson and Walter Potter shall be allowed to retain all sums of money heretofore received by them on account of their several claims against Boies, Fay & Conkey, or Fay & Conkey, and that in consideration thereof, the said last named defendants and each of them are forever barred from making any further claim to any of the funds realized in this suit, or from participating in any dividend that may hereafter be declared therein and they and each of them hereby waive all claim for costs.

Except it be with the view of misleading this court we are

unable to see why appellant's counsel should say on page 83 of their brief that:

> *"The controversy is between the creditors of two firms, the gist of it being as to which of the two, certain assets belong, and the rights of creditors as to priority depending upon the result of that controversy."*

In reply to this, we say there is no controversy whatever between the creditors of Fay & Conkey and the creditors of Boies, Fay & Conkey. The court below (his Honor, Judge Drummond) appointed Robert E. Jenkins receiver for both firms, and put him in possession of both firm's assets. On the hearing of the cause, the court below found there was no lawful dissolution of the firm of Boies, Fay & Conkey, and all creditors of either firm were allowed to and did, in accordance with the decree of November 17, 1885, go before the master and prove up their several claims. A very few of the claimants had small bills which were purchased a few days before the failure, that were against Fay & Conkey, but in view of the November 17, 1885 decree, the master approved and allowed all such bills. (Bank Rec., 88.) A singular circumstance about such bills being that nearly all the creditors who had these small bills against Fay & Conkey were represented before the master by Flower, Remy & Gregory—for instance the Towle, Carle & Co. claim, Mr. Towle testified before the master. (Bank Rec., 88.)

> Q. (By Mr. Manning.) Who are your attorneys in presenting this claim before the master? A. Flower, Remy & Gregory.
>
> Q. Your claim is against Fay & Conkey? A. Yes, sir.
>
> Q. (Page 89.) Then, as I understand you, you make no claim in this proceeding except as against Fay & Conkey? A. Fay & Conkey—that is all.

This claim of Towle, Carle & Co. is allowed by the master. (Bank Rec., 16.)

The claim of Sprague, Warner & Co. was also allowed by the master for $1,776.74. (Bank Rec., 16.)

The report of the master on this claim is as follows (Bank Rec., 19):

"The master finds this a valid claim against the said limited partnership, and further finds the following facts: That defendants, Fay & Conkey, by Flower, Remy & Gregory, their solicitors, confessed a judgment for this indebtedness to Sprague, Warner & Co. in the name of D. C. Adams, who was at that time an employe of Sprague, Warner & Co.; that this judgment was confessed in the name of D. C. Adams because he was not a resident of the State of Illinois, and therefore, a judgment in his favor could be confessed in this court; that the said Fay & Conkey were not indebted to said Adams in any sum whatsoever, but that he was in that regard simply a trustee for the firm of Sprague, Warner & Co.; that said Adams was made a party defendant in this cause, and as such by Flower, Remy & Gregory, his solicitors filed his answer herein in which said Adams with others answered as follows: 'These defendants, further answering, say that they claim nothing as against the estate of Boies, Fay & Conkey by virtue of the judgment so confessed in their favor, except the right to hold such judgment as a special claim against the defendants Fay & Conkey, who executed the note upon which said judgments were confessed.'"

After a claim like this has been presented by Flower, Remy & Gregory and allowed by the master against the limited partnership, it seems remarkable that Mr. Flower should argue as he has done in his brief, giving the inference that there are still some Fay & Conkey creditors who are not provided for under the November 17, 1885, decree of the court below.

We *assert, maintain and insist* that there is no creditor of either Boies, Fay & Conkey or Fay and Conkey, except the First National Bank of Chicago, who is not provided for and entirely satisfied with the decrees of the court below, *not one*, unless Julius K. Graves still claims to be a creditor and if he does he must under the limited partnership law, act in good faith with the firm creditors and wait until their claims are first satisfied.

The creditors of Boies, Fay & Conkey numbering over one hundred and forty have had six years of hotly contested litigation with these appellants and they desire to have the limited

partnership law of Illinois finally settled by a decision of this court. In every city, limited partnerships are formed, wealthy men go into these partnerships, as special partners, and by so doing give credit to the firms so organized.

On March 30, 1882, when *this* limited partnership was formed for five years, the firm creditors had the right to presume such partnership would continue to the end of the term. Under the limited partnership laws of Illinois, or of any other of the states, persons who deal with limited co-partnerships carry on such dealings with the certainty that in case of failure, there can be no preferences and with the knowledge that the assets of the insolvent firm must be equally distributed among its creditors.

Appellant's counsel, in their brief (p. 50), say:

> Graves sold his interest in the business to Fay and took his note for $50,000 at five years, indorsed by Fay and Conkey.

Let us see what the record says about this pretended sale. Mr. Graves testified as follows (Graves' Rec., 1049):

> C. Q. (by Mr. MANNING). I understand you took Mr. Fay's note for $50,000, indorsed by Fay & Conkey. Will you be so kind as to let me see that note? A. I haven't got the note.
>
> C. Q. Where is it? A. I gave it to Mr. Remy.
>
> C. Q. How long since? A. Shortly after its execution.
>
> C. Q. When was it executed? A. When the dissolution was. I do not think it was until it was published.
>
> C. Q. How long after it was published before you gave that note to Mr. Remy? A. After the failure.
>
> C. Q. And he still has it, so far as you know? A. He said it was not worth the paper it was written on. I think he tore it up.
>
> C. Q. (p. 1050). Did you direct that it be torn up? A. I did not care what he did; I had no objection to it; I knew it was not worth a cent.

Mr. Fay testified about this pretended sale, when called as a witness by the defendants, as follows (Graves' Rec., 965):

> Q. (By Mr. FLOWER): State whether or not any transfer was made to

you by Mr. Graves, of his interest in the firm assets, at the time of the dissolution? A. We gave him a note for $50,000.

Q. How long did that note have to run? A. I do not recollect how long a time the note was made out for, but the understanding was we were to have that money during the time we wanted it—we remained in business.

Q. Did he execute to you any paper conveying his interest in the business?

A. I do not recollect that he did.

It may be true that Fay and Graves, in furtherance of their scheme, pretended to give and receive a note, but their manner of dealing does not appear very legitimate or straightforward, in the light of their testimony. Fay says "*we were to have that money during the time we remained in business*," and they intended to remain in business *six weeks*, while their pretended dissolution notice was being published. Appellants, at page 53 of their brief, say: "Fay testifies that August 1, "1882, there was a surplus in the business of $50,000, as "shown by the books." On cross-examination Mr. Fay testified as follows (Graves' Rec., 970);

C. Q. Then, if I understand you, Mr. Fay, all you wish to be understood about any surplus you have testified to, is what you learned from Mr. Vaughan and his assistants at that time, in August, 1882? A. I took it from figures given me from the books.

C. Q. And that was the basis of your knowledge in testifying here the other day, was it not? A. Yes, sir.

We further submit that great injustice would result from now allowing the appellant, The First National Bank, to prove up its claim on paying back the amount it has so unlawfully received.

If banks can obtain their unlawful preferences, and then after six years of litigation, refund and come in *pro rata* with other creditors, they would thereby be encouraged to continue their unlawful practices, because they would know, that at the end of whatever litigation might arise, they would lose none of their rights. Let it once be proclaimed by this court that the

penalty for such acts as we have shown in this case, is a refusal to be allowed to share in the fund realized, and then no one creditor of a limited partnership will seek to get a preference over another creditor.

We do not deem it necessary to discuss the *White* v. *Cotzhausen* case further than to say, that decision is hailed with joy by merchants everywhere; that decision settles the law in regard to "assignments." And now we know we speak the mind of every honest merchant in the United States when we say we want the law in regard to *limited* or *special partnerships* as laid down by Chancellor Walworth in *Innes* v. *Lansing*, *supra*, reaffirmed in this court. This case has been reviewed and approved in the following cases:

Van Alstye v. *Cook*, 25 N. Y., 489.
Whitcomb v. *Fowle*, 56 How. Prac., 365.
Whitewright v. *Stimpson*, 2 Barb., 379.
Levy v. *Ley*, 6 Abbt. Pr., 89.
La Cliase v. *Lord*, 10 Howard Pr., 461.
Kerr v. *Blodgett*, 48 N. Y., 63.
Batchelder v. *Altheimer*, 10 Mo. Appeals, 181.
McArthur v. *Chase*, 13 Grattan (Va.), 683.

But we do not find that this court has decided a case for many years past on the question involved in the *Innes* v. *Lansing* case.

Counsel for appellants have seen fit to cite *Case* v. *Beauregard*, 99 U. S., 129, and several other cases on the point that a simple contract creditor cannot assail a transaction by his debtor without first having obtained a judgment, and the return of an execution *nulla bona*.

Our reply is that in none of these cases was there a limited or special partnership, or any question passed upon under the limited partnership law.

Chancellor Walworth, in *Innes* v. *Lansing*, *supra*, laid down the rule "that a creditor of an insolvent limited partnership "should not be compelled to proceed to judgment and execu- "tion at law before he could be permitted to file a bill in chan- "cery to prevent the partnership funds from being wasted by "the insolvent partners and to obtain payment of a ratable por- "tion of the debt out of the fund."

In the case at bar we charge that neither Mr. Fay, Mr. Graves or Mr. Gage acted in good faith with the purchasers of the firm's notes, or with the merchandise creditors of the firm. Mr. Gage, in behalf of the bank, extended accommodations to Boies, Fay & Conkey on the faith of Fay's and Graves' promise to protect the bank in case of failure. The complainant, Corbin and the merchandise creditors, ignorant of this agreement, bought the firm paper, and sold them goods on credit, trusting to the firm's honesty and integrity and believing their limited partnership was organized and being carried on fairly; they would not have done this if they had known of the existing agreement to prefer the First National Bank, or, had they known of the signing of the various secret dissolution papers during October, 1882.

Or, had they known of the secret agreement to pay Graves $10,000 per annum, whether the firm made or lost money.

Or, had they known, that as fast as the new goods, bought on the firm's credit in October and November, 1882, arrived, they were being pledged to the First National Bank as collateral security for demand loans and overdrafts, which together amounted to over $60,000.

Or, had they known of the firm's overdrafts at the First National Bank in October, November and December, 1882.

Or, had they known of the protest of a $5,000 note of the firm, payable to J. K. Graves on December 14, 1882.

Or, had they known of the arrangement made by Fay and Gage on or about December 6, 1882, that thereafter the firm's checks would be honored by the First National Bank, whether signed by Fay & Conkey, or by Boies, Fay & Conkey.

Or, had they known that on January, 16, 1883, the firm's check for $1,500, payable to J. K. Graves, was protested for non-payment by the First National Bank.

Or, had they known that out of the $12,000 cash on hand on January 20, 1883, Graves was going to take $10,000 of it and take up from Mr. Gage at the First National Bank $10,000 of notes, not yet due, on which he was individually liable, and that the balance was going to be equally divided in the evening between Fay and Conkey.

Or, had they known of the raid on the firm's Sunday mail, January 21, 1883, in Flower, Remy & Gregory's office, whereby J. K. Graves got nearly $3,000 *more* of the firm's money; or had they known of the three divisions of nearly $2,000 more, made between Fay & Conkey, of the moneys received in Monday's mail, January 22, 1883, they certainly would not have sold the firm any goods on credit; nor would they have permitted the goods before then sold on credit, to have long remained in the firm's possession; nor would Beveridge and Dewey, as brokers for the firm, had any of these things been known, been able to sell, as they did, the firm's paper on the Boston or New York markets at the rate of eight per cent. per annum discount.

The facts are, that a gross fraud was perpetrated on all the parties who dealt with this firm after August 20, 1882.

After considering the relations shown to exist between Fay, Graves and Gage, we can arrive at no other conclusion than that after August, 1882, the First National Bank dealt with the firm of Boies, Fay & Conkey and extended credit to it, re-

lying either on Fay's promise to Mr. Gage that he would protect the bank in case of failure, or on some secret promise of J. K. Graves to Mr. Gage to the effect that in any event, he, Graves, would see the bank paid in full. Mr. Graves voluntarily states that in September, 1882, the firm's checks were honored by the First National Bank *regardless of the amount*, on the strength of his verbal promise to Mr. Gage that he would personally guarantee every check that Mr. Vaughan would draw while Mr. Fay was away.

If Mr. Graves' verbal guarantee to Mr. Gage was good at the First National Bank for any amount in September, 1882, why was it not equally good in January, 1883?

If Graves and Gage were *not* acting in concert during January, 1883, and if Graves was not in fact obligated in some way to see the bank paid in full, why should he voluntarily consent that the execution in favor of the bank should have a first lien on the firm's stock of merchandise?

The testimony shows that neither Fay or Conkey saw Mr. Gage about giving the $40,000 judgment note. Mr. Fay says *he* signed it because he understood that *Graves had arranged with Gage about it*. Why should Graves make the arrangement with Mr. Gage for Mr. Fay and Mr. Conkey to individually sign a $40,000 judgment note in favor of the First National Bank as a general collateral security for any deficiency there might be after exhausting the securities then held by the bank, *if he* (*Graves*) was in no way liable to make good such deficiency?

Is it unreasonable to suppose that J. K. Graves told Mr. Gage to protect his interest as best he could through the firm's failure, and in the end if there was a deficiency at the First National Bank to charge it up to the account of Commercial National Bank of Dubuque. He (J. K. Graves) being then a

stockholder, a director, and practically the manager of that bank.

In reference to the position the First National Bank occupy in this case, we claim, in behalf of the creditors, that whatever deceit and fraud has been perpetrated upon the creditors of this limited partnership, has been effected largely through the medium, or at least with the assistance of the First National Bank. When, on or about December 6, 1882, Mr. Gage, in behalf of the bank, arranged with Mr. Fay, in behalf of the firm, that thereafter the firm's checks should be honored, whether signed by Fay & Conkey or Boies, Fay & Conkey, he assisted Mr. Fay in carrying out his fraudulent scheme of deceiving the firm creditors, because after that date he could use either signature, as he saw fit, in signing checks or notes.

Again, on December 8, 1882, when Mr. Gage made, for the bank, his third demand loan of $8,000, and took as security the goods as they came in, which had been purchased in the name of, and on the credit of Boies, Fay & Conkey, he further assisted Mr. Fay and Mr. Graves to perfect the scheme concocted by them before Mr. Fay went east to buy goods in September.

Again, on December 14, 1882, when the First National Bank protested a $5,000 note of the firm, payable to J. K. Graves, Mr. Gage, by suppressing or by keeping this fact from the creditors and from the commercial agencies, again rendered assistance to Mr. Fay and Mr. Graves, and helped them to continue their fraud.

Again, on January 16, 1883, when the First National Bank protested a $1,500 firm check, payable to J. K. Graves, by suppressing such act and withholding such fact from the creditors, he rendered further assistance to Mr. Fay and Mr. Graves.

Again, on January 20, 1883, when Mr. Gage permitted Mr. Fay and Mr. Graves to take up two $5,000 notes, one seven and the other nine days before due, on which Graves was individually liable, instead of requiring them to leave that sum on deposit, he thereby assisted them, to relieve Graves of this liability, and to be entirely ready on Monday, January 22d, for the judgment by confession in favor of the bank to be entered, and the failure to be publicly announced. Without the assistance so rendered, by Mr. Gage, to Mr. Fay and Mr. Graves, the failure of this firm would certainly have occurred on or about December 6, 1882, when the firm's bank account was so largely overdrawn at the First National Bank.

In addition to Mr. Remy's knowledge of the insolvency of this firm, there is *sufficient* in the record to show, beyond a doubt, that Mr. Gage, if he did not actually know of the fraudulent scheme that Fay, Graves and Remy were attempting to carry through, to defraud the firm's creditors, knew enough to put a reasonable man upon his guard and to make him at least suspect the firm's failure was imminent, and we submit that the fact is established that Mr. Gage, in behalf of the bank relied and acted on the faith of the promises made to him by Fay and Graves, that in case of failure, the bank should be protected at all hazards, and so relying upon their promises, he permitted them to transact their business through the First National Bank in about such manner as they saw fit.

This conclusion is warranted by the testimony of Mr. Gage, because he says that on January 20, 1883, when he accepted in behalf of the First National Bank this $40,000 judgment note, he did not then *know* that it was unlawful for a limited partnership to prefer its creditors in case of insolvency.

In view of the conduct of the First National Bank in this case, we submit that it should not be allowed to share *pro rata*

with other creditors. In *White* v. *Graves*, 7 J. J. Marshall, 526, the court says:

"After a creditor has endeavored to obtain a fraudulent "preference over the other creditors of an insolvent debtor by "a transfer of the whole of the debtor's property, and those "creditors have obtained a decree setting it aside as null and "void, we do not think the chancellor ought to hear his claim "until the others are first satisfied."

Inasmuch as an order was entered consolidating these two cases, and as practically the same errors are assigned in each, we submit the foregoing as applicable to both cases, and claim that each and every finding of the court below in the two cases should be approved, and we respectfully submit that the decree of the court below in the *Graves* v. *Corbin* case and in *The First National Bank of Chicago* v. *Corbin* should be affirmed.

WM. J. MANNING,
Counsel for Appellee.